

# **CUSTOMS BULLETIN AND DECISIONS**

**Weekly Compilation of  
Decisions, Rulings, Regulations, Notices, and Abstracts  
Concerning Customs and Related Matters of the  
Bureau of Customs and Border Protection  
U.S. Court of Appeals for the Federal Circuit  
and  
U.S. Court of International Trade**

**VOL. 38**

**FEBRUARY 4, 2004**

**NO. 6**

*This issue contains:*

Bureau of Customs and Border Protection  
CBP Decisions 04-01 Through 04-03  
General Notices  
U.S. Court of International Trade  
Slip Op. 03-168  
Slip Op. 04-5

### **NOTICE**

The decisions, rulings, regulations, notices and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the Bureau of Customs and Border Protection, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

**Please visit the U.S. Customs Web at:  
<http://www.cbp.gov>**

# Bureau of Customs and Border Protection

## *Treasury Decisions*

(CBP Dec. 04-01)

### FOREIGN CURRENCIES

#### VARIANCES FROM QUARTERLY RATES FOR DECEMBER, 2003

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in CBP Decision 03-33 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates.

Holiday(s): December 25, 2003

Australia dollar:

December 1, 2003 .....	\$0.726500
December 2, 2003 .....	.731800
December 3, 2003 .....	.735800
December 4, 2003 .....	.733600
December 5, 2003 .....	.735800
December 6, 2003 .....	.735800
December 7, 2003 .....	.735800
December 8, 2003 .....	.740200
December 9, 2003 .....	.739800
December 10, 2003 .....	.739800
December 11, 2003 .....	.735500
December 12, 2003 .....	.742500
December 13, 2003 .....	.742500
December 14, 2003 .....	.742500
December 15, 2003 .....	.742900
December 16, 2003 .....	.743600
December 17, 2003 .....	.740800
December 18, 2003 .....	.737400
December 19, 2003 .....	.736500
December 20, 2003 .....	.736500
December 21, 2003 .....	.736500
December 22, 2003 .....	.734000
December 23, 2003 .....	.736100
December 24, 2003 .....	.743000

# FOREIGN CURRENCIES—Variances from quarterly rates for December 2003 (continued):

## Australia dollar: (continued):

December 25, 2003 .....	.743000
December 26, 2003 .....	.741500
December 27, 2003 .....	.741500
December 28, 2003 .....	.741500
December 29, 2003 .....	.742200
December 30, 2003 .....	.748200
December 31, 2003 .....	.752000

## Denmark krone:

December 17, 2003 .....	\$0.166320
December 18, 2003 .....	.166246
December 19, 2003 .....	.166500
December 20, 2003 .....	.166500
December 21, 2003 .....	.166500
December 22, 2003 .....	.166847
December 23, 2003 .....	.166653
December 24, 2003 .....	.167420
December 25, 2003 .....	.167420
December 26, 2003 .....	.167280
December 27, 2003 .....	.167280
December 28, 2003 .....	.167280
December 29, 2003 .....	.167140
December 30, 2003 .....	.168138
December 31, 2003 .....	.169062

## New Zealand dollar:

December 1, 2003 .....	\$0.643800
December 2, 2003 .....	.646600
December 3, 2003 .....	.648600
December 4, 2003 .....	.645200
December 5, 2003 .....	.644800
December 6, 2003 .....	.644800
December 7, 2003 .....	.644800
December 8, 2003 .....	.647300
December 9, 2003 .....	.646300
December 10, 2003 .....	.648500
December 11, 2003 .....	.644500
December 12, 2003 .....	.648200
December 13, 2003 .....	.648200
December 14, 2003 .....	.648200
December 15, 2003 .....	.648600
December 16, 2003 .....	.650600
December 17, 2003 .....	.648100
December 18, 2003 .....	.645000
December 19, 2003 .....	.644000
December 20, 2003 .....	.644000
December 21, 2003 .....	.644000
December 22, 2003 .....	.642500
December 23, 2003 .....	.641000
December 24, 2003 .....	.647500

## FOREIGN CURRENCIES—Variances from quarterly rates for December 2003 (continued):

## New Zealand dollar: (continued):

December 25, 2003.....	.647500
December 26, 2003.....	.648100
December 27, 2003.....	.648100
December 28, 2003.....	.648100
December 29, 2003.....	.648700
December 30, 2003.....	.653500
December 31, 2003.....	.655700

## Norway krone:

December 5, 2003.....	\$0.150342
December 6, 2003.....	.150342
December 7, 2003.....	.150342
December 8, 2003.....	.150376
December 9, 2003.....	.150512
December 10, 2003.....	.150008
December 12, 2003.....	.150060
December 13, 2003.....	.150060
December 14, 2003.....	.150060
December 31, 2003.....	.150015

## South Africa rand:

December 1, 2003.....	\$0.156507
December 2, 2003.....	.157572
December 3, 2003.....	.159617
December 4, 2003.....	.159742
December 5, 2003.....	.158479
December 6, 2003.....	.158479
December 7, 2003.....	.158479
December 8, 2003.....	.154440
December 9, 2003.....	.156067
December 10, 2003.....	.153492
December 11, 2003.....	.156187
December 12, 2003.....	.157233
December 13, 2003.....	.157233
December 14, 2003.....	.157233
December 15, 2003.....	.158228
December 16, 2003.....	.156863
December 17, 2003.....	.153139

## Sweden krona:

December 8, 2003.....	\$0.136724
December 9, 2003.....	.136893
December 12, 2003.....	.136949
December 13, 2003.....	.136949
December 14, 2003.....	.136949
December 15, 2003.....	.136203
December 16, 2003.....	.136472
December 17, 2003.....	.137268
December 18, 2003.....	.136277

# FOREIGN CURRENCIES—Variances from quarterly rates for December 2003 (continued):

## Sweden krona: (continued):

December 19, 2003.....	.136500
December 20, 2003.....	.136500
December 21, 2003.....	.136500
December 22, 2003.....	.136519
December 23, 2003.....	.136705
December 24, 2003.....	.137024
December 25, 2003.....	.137024
December 26, 2003.....	.136612
December 27, 2003.....	.136612
December 28, 2003.....	.136612
December 29, 2003.....	.137552
December 30, 2003.....	.137703
December 31, 2003.....	.138985

## Switzerland franc:

December 24, 2003.....	\$0.802182
December 25, 2003.....	.802182
December 30, 2003.....	.803084
December 31, 2003.....	.807754

## United Kingdom Pound sterling:

December 16, 2003.....	\$1.751000
December 17, 2003.....	1.761500
December 18, 2003.....	1.767300
December 19, 2003.....	1.767500
December 20, 2003.....	1.767500
December 21, 2003.....	1.767500
December 22, 2003.....	1.763500
December 23, 2003.....	1.765000
December 24, 2003.....	1.774800
December 25, 2003.....	1.774800
December 26, 2003.....	1.772500
December 27, 2003.....	1.772500
December 28, 2003.....	1.772500
December 29, 2003.....	1.770500
December 30, 2003.....	1.778600
December 31, 2003.....	1.784200

Dated: January 16, 2004

RICHARD B. LAMAN,  
*Chief,*  
*Customs Information Exchange.*

(CBP Dec. 04-02)

## FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR  
DECEMBER, 2003

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday(s): December 25, 2003

European Union euro:

December 1, 2003.....	\$1.195600
December 2, 2003.....	1.208400
December 3, 2003.....	1.209300
December 4, 2003.....	1.207700
December 5, 2003.....	1.215700
December 6, 2003.....	1.215700
December 7, 2003.....	1.215700
December 8, 2003.....	1.221700
December 9, 2003.....	1.222900
December 10, 2003.....	1.221500
December 11, 2003.....	1.216400
December 12, 2003.....	1.228400
December 13, 2003.....	1.228400
December 14, 2003.....	1.228400
December 15, 2003.....	1.229000
December 16, 2003.....	1.232800
December 17, 2003.....	1.238100
December 18, 2003.....	1.237600
December 19, 2003.....	1.238000
December 20, 2003.....	1.238000
December 21, 2003.....	1.238000
December 22, 2003.....	1.241500
December 23, 2003.....	1.240600
December 24, 2003.....	1.246400
December 25, 2003.....	1.246400
December 26, 2003.....	1.244100
December 27, 2003.....	1.244100
December 28, 2003.....	1.244100
December 29, 2003.....	1.248500
December 30, 2003.....	1.252100
December 31, 2003.....	1.259700

South Korea won:

December 1, 2003.....	\$0.000833
December 2, 2003.....	.000836
December 3, 2003.....	.000836
December 4, 2003.....	.000839
December 5, 2003.....	.000840

FOREIGN CURRENCIES—Daily rates for Countries not on quarterly list for December 2003 (continued):

South Korea won: (continued):

December 6, 2003.....	.000840
December 7, 2003.....	.000840
December 8, 2003.....	.000842
December 9, 2003.....	.000843
December 10, 2003.....	.000843
December 11, 2003.....	.000842
December 12, 2003.....	.000844
December 13, 2003.....	.000844
December 14, 2003.....	.000844
December 15, 2003.....	.000845
December 16, 2003.....	.000839
December 17, 2003.....	.000841
December 18, 2003.....	.000841
December 19, 2003.....	.000838
December 20, 2003.....	.000838
December 21, 2003.....	.000838
December 22, 2003.....	.000837
December 23, 2003.....	.000836
December 24, 2003.....	.000833
December 25, 2003.....	.000833
December 26, 2003.....	.000833
December 27, 2003.....	.000833
December 28, 2003.....	.000833
December 29, 2003.....	.000835
December 30, 2003.....	.000835
December 31, 2003.....	.000839

Taiwan N.T. dollar:

December 1, 2003.....	\$0.029283
December 2, 2003.....	.029283
December 3, 2003.....	.029326
December 4, 2003.....	.029326
December 5, 2003.....	.029317
December 6, 2003.....	.029317
December 7, 2003.....	.029317
December 8, 2003.....	.029369
December 9, 2003.....	.029386
December 10, 2003.....	.029377
December 11, 2003.....	.029386
December 12, 2003.....	.029386
December 13, 2003.....	.029386
December 14, 2003.....	.029386
December 15, 2003.....	.029386
December 16, 2003.....	.029394
December 17, 2003.....	.029394
December 18, 2003.....	.029369
December 19, 2003.....	.029369
December 20, 2003.....	.029369
December 21, 2003.....	.029369
December 22, 2003.....	.029369
December 23, 2003.....	.029369

FOREIGN CURRENCIES—Daily rates for Countries not on quarterly list for December 2003 (continued):

Taiwan N.T. dollar: (continued):

December 24, 2003.....	.029369
December 25, 2003.....	.029369
December 26, 2003.....	.029369
December 27, 2003.....	.029369
December 28, 2003.....	.029369
December 29, 2003.....	.029360
December 30, 2003.....	.029386
December 31, 2003.....	.029420

Dated: January 16, 2004

RICHARD B. LAMAN,  
*Chief,*  
*Customs Information Exchange.*

(CBP Dec. 04-03)

CIE C 03/04  
LIQ-03-01-RR:OO:CI

RE: SECTION 159.34 CFR

SUBJECT: CERTIFIED RATES OF FOREIGN EXCHANGE:  
FIRST QUARTER, 2004

LISTED BELOW ARE THE BUYING RATES CERTIFIED FOR THE QUARTER TO THE SECRETARY OF THE TREASURY BY THE FEDERAL RESERVE BANK OF NEW YORK UNDER PROVISION OF 31 USC 5151. THESE QUARTERLY RATES ARE APPLICABLE THROUGHOUT THE QUARTER EXCEPT WHEN THE CERTIFIED DAILY RATES VARY BY 5% OR MORE. SUCH VARIANCES MAY BE OBTAINED BY CALLING (646) 733-3065 OR (646)733-3057.

QUARTER BEGINNING JANUARY 1, 2004 AND  
ENDING MARCH 31, 2004

COUNTRY	CURRENCY	U.S. DOLLARS
AUSTRALIA .....	DOLLAR.....	\$0.757600
BRAZIL.....	REAL.....	\$0.346741
CANADA.....	DOLLAR.....	\$0.775194
CHINA, P.R.....	YUAN.....	\$0.120818
DENMARK.....	KRONE.....	\$0.169087
HONG KONG .....	DOLLAR.....	\$0.128791
INDIA .....	RUPEE .....	\$0.021891

COUNTRY	CURRENCY	U.S. DOLLARS
JAPAN.....	YEN .....	\$0.009350
MALAYSIA.....	RINGGIT .....	\$0.263158
MEXICO.....	NEW PESO .....	\$0.090131
NEW ZEALAND.....	DOLLAR.....	\$0.658800
NORWAY.....	KRONE.....	\$0.150173
SINGAPORE.....	DOLLAR.....	\$0.587475
SOUTH AFRICA.....	RAND .....	\$0.152323
SRI LANKA.....	RUPEE .....	\$0.010262
SWEDEN.....	KRONA.....	\$0.139076
SWITZERLAND.....	FRANC .....	\$0.807103
THAILAND.....	BAHT.....	\$0.025291
UNITED KINGDOM.....	POUND STERLING .....	\$1.790200
VENEZUELA.....	BOLIVAR .....	\$0.000625

Dated: January 15, 2004

RICHARD B. LAMAN,  
*Chief,*  
*Customs Information Exchange.*

DEPARTMENT OF HOMELAND SECURITY,  
OFFICE OF THE COMMISSIONER OF CUSTOMS.

*Washington, DC, January 21, 2004,*

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

SANDRA L. BELL,  
*Acting Assistant Commissioner,  
Office of Regulations and Rulings.*

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### *General Notices*

#### **PROPOSED REVOCATION OF CLASSIFICATION LETTER AND REVOCATION OF TREATMENT RELATING TO CLAS- SIFICATION OF HOOK AND EYE TAPE USED FOR BRAS- SIERES**

**AGENCY:** Bureau of Customs and Border Protection, Dept. of Homeland Security

**ACTION:** Notice of proposed revocation of one ruling letter and revocation of treatment relating to the classification of hook and eye tape used for brassieres.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs and Border Protection (CBP) intends to revoke one ruling letter relating to the classification of hook and eye tape for brassieres under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Similarly, CBP is revoking any treatment previously accorded by it to substantially identical merchandise.

**DATE:** Comments must be received on or before March 5, 2004.

**ADDRESS:** Written comments are to be addressed to Bureau of Customs and Border Protection, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at Customs and Border Protection, 799 9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect sub-

mitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572-8768.

**FOR FURTHER INFORMATION CONTACT:** Teresa Frazier, Textiles Branch, at (202) 572-8824.

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under Customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to revoke one ruling letter relating to the tariff classification of certain hook and eye tape for brassieres. Although in this notice CBP is specifically referring to the revocation of New York Ruling Letter (NY) H88921, dated March 15, 2002 (see Attachment "A"), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625 (c)(2)), as amended by section 623 of Title VI, Customs and Border Protection intends to revoke any treatment previously accorded by CBP to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reli-

ance on a ruling issued to a third party, CBP's personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBP's previous interpretation of the HTSUSA. Any person involved with substantially identical merchandise should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY H88921, dated March 15, 2002, CBP classified hook and eye tape used for brassieres in subheading 6212.90.0010, Harmonized Tariff Schedule of the United States Annotated, which provides for brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted: other, of cotton or cotton and rubber or plastics.

Upon review of these rulings, CBP has determined that the merchandise's classification in subheading 6212.90.0010, HTSUSA, was incorrect. Rather, Customs finds the merchandise is more specifically classified in subheading 8308.10.0000, HTSUSA, which provides, in pertinent part, for hooks, eyes, and eyelets.

Pursuant to 19 U.S.C. 1625(c)(1), CBP intends to revoke NY H88921 and any other rulings not specifically identified that are contrary to the determination set forth in this notice to reflect consistency in classification pursuant to the analysis set forth in proposed Headquarters Ruling Letter HQ 966818 (see Attachment "B"). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Before taking this action, consideration will be given to any written comments timely received.

**DATED:** January 14, 2004

Gail A. Hamill for MYLES B. HARMON,  
*Director,*  
*Commercial Rulings Division.*

Attachments

## [ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.  
BUREAU OF CUSTOMS AND BORDER PROTECTION,  
NY H88921  
March 15, 2002  
CLA-2-62:RR:NC:TAB:354 H88921  
CATEGORY: Classification  
TARIFF NO.: 6212.90.0010

MR. HARRISON CHEN  
THE JAY COMPANY  
22 West 38th Street  
New York, NY 10018

RE: The tariff classification of hook & eye tape for brassieres from China

DEAR MR. CHEN:

In your letter dated February 26, 2002, you requested a tariff classification ruling.

The submitted sample consists of two strips of woven cotton fabric tape. On one piece metal hooks are sewn-on at one-inch intervals. On the other strip metal eyes are sewn-on at one-inch intervals. Your inquiry indicates that the item will be used for bras.

The applicable subheading for the hook & eye tape will be 6212.90.0010, Harmonized Tariff Schedule of the United States (HTS), which provides for brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted: other, of cotton or cotton and rubber or plastics. The rate of duty will be 6.7 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Brian Burtnik at 646-733-3054.

ROBERT B. SWIERUPSKI,  
*Director,*  
*National Commodity Specialist Division.*

## [ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.  
BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 966818  
CLA-2 RR:CR:TE 966818 TMF  
CATEGORY: Classification  
TARIFF NO.: 8308.10.0000

MR. HARRISON CHEN  
THE JAY COMPANY  
22 West 38th Street  
New York, NY 10018

RE: New York Ruling Letter (NY) H88921; classification of hook and eye tape fasteners used for brassieres; Additional U.S. Rule of Interpretation 1(c)

DEAR MR. CHEN:

Pursuant to your request dated February 26, 2002 for a binding tariff classification ruling of certain hook and eye fasteners, Customs and Border Protection issued New York Ruling Letter (NY) H88921, dated March 15, 2002. This ruling classified the goods in subheading 6212.90.0010, Harmonized Tariff Schedule of the United States Annotated, which provides for brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted: other, of cotton or cotton and rubber or plastics.

Upon review, the Bureau of Customs and Border Protection (CBP) has determined that the merchandise was erroneously classified. This ruling letter sets forth the correct classification determination.

**FACTS:**

The description of the hook and eye tape used for brassieres is taken directly from New York Ruling Letter (NY) H88921, dated March 15, 2002, which reads as follows:

The submitted sample consists of two strips of woven cotton fabric tape. On one piece metal hooks are sewn-on at one-inch intervals. On the other strip metal eyes are sewn-on at one-inch intervals. Your inquiry indicates that the item will be used for bras.

**ISSUE:**

Whether the merchandise at issue is classifiable as parts of brassieres or similar articles of heading 6212, as parts of garments, other than those of heading 6212, under heading 6217, or as hooks and eyes of heading 8308, HTSUSA.

**LAW AND ANALYSIS:**

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. When goods cannot be classified solely on the basis of GRI 1 and if the headings or notes do not require otherwise, the remaining GRIs 2 through 6 may be applied.

Additionally, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) are the official interpretation of the Harmonized

System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Heading 8308, HTSUSA, provides *eo nomine* for, among other things, hooks and eyes. In this instance, the subject hook and eye tape will be used in the production of brassieres. The issue in this case is whether the subject articles in their condition as imported are classifiable in heading 6212, HTSUSA, which provides for various body supporting garments and parts thereof, or in heading 6217, HTSUSA, as parts of garments, other than those of heading 6212, or as hooks and eyes of a kind used in clothing of heading 8308, HTSUSA.

Heading 8308, HTSUSA, provides, in part, for hooks and eyes, eyelets and the like, of a kind used for clothing. Heading 6212, HTSUSA, provides, in part, for brassieres and parts thereof and heading 6217 provides, in part, for parts of garments other than those of heading 6212, such as parts of swimwear, exercise and dance garments. We refer to the Explanatory Note for 83.08 which states that heading 8308 includes hooks, eyes and eyelets for clothing. The EN also states that the articles referred to "may contain parts of leather, textiles, plastics, wood, horn, bone, ebonite, mother of pearl, ivory, imitation precious stones, etc., **provided** they retain the essential character of articles of base metal. They may also be ornamented by working of the metal."

In this instance, three tariff provisions address the hook and eye materials at issue, but only one is appropriate for classifying the instant goods by application of Additional U.S. Rule of Interpretation 1(c), HTSUS, which states:

[I]n the absence of special language or context which otherwise requires—

a provision for parts of an article covers products solely or principally used as a part of such articles but a provision for "parts" or "parts and accessories" shall not prevail over a specific provision for such part or accessory

In the case at bar, heading 6212 provides for a variety of body supporting garments and parts thereof while heading 8308 provides *eo nomine* for hooks and eyes. In consideration of Rule 1(c) above, heading 6212, HTSUSA, which covers hooks and eyes that are used solely or principally as parts of body supporting garments, is not the most specific heading for classifying the instant goods. For the same reason, heading 6217 is not the most specific heading. Rather, heading 8308, HTSUSA, which provides for hooks and eyes (that may contain textile parts) used in any type of clothing, is the most specific for classifying the instant articles.

By application of Additional U.S. Rule of Interpretation 1(c), HTSUS, heading 8308, HTSUSA, which provides *eo nomine* for hooks and eyes, is the most specific heading for classifying the instant articles. In this instance, the subject article is classifiable in 8308.10.0000, HTSUSA, which provides, in pertinent part, for hooks, eyes, and eyelets. See Headquarters Ruling Letter (HQ) 966246, dated October 18, 2003; NY F83301, dated March 20, 2000, and NY 832964, dated December 13, 1988.

#### **HOLDING:**

NY H88921, dated March 15, 2002, is hereby revoked. Based on the foregoing, the subject hook and eye tape is classifiable in subheading

8308.10.0000, HTSUSA, which provides, in pertinent part, for hooks, eyes, and eyelets, dutiable at the column one general rate of 1.1 cents/kilogram + 2.9 percent *ad valorem*.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

MYLES B. HARMON,  
*Director,*  
*Commercial Rulings Division.*

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### 19 CFR PART 177

#### PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF A SET TOP BOX

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed revocation of ruling letter and treatment relating to the tariff classification of a set top box.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is proposing to revoke a ruling pertaining to the tariff classification of a set top box under the Harmonized Tariff Schedule of the United States ("HTSUS"). Similarly, Customs is proposing to revoke any treatment previously accorded by Customs to substantially identical transactions. Customs invites comments on the correctness of the proposed action.

DATE: Comments must be received on or before March 5, 2004.

ADDRESS: Written comments are to be addressed to the U.S. Bureau of Customs and Border Protection, Office of Regulations & Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Submitted comments may be inspected at the offices of U.S. Customs and Border Protection, 799 9th Street, NW, Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 572-8768.

FOR FURTHER INFORMATION CONTACT: Deborah Stern, General Classification Branch (202) 572-8785.

## SUPPLEMENTARY INFORMATION:

## BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of a television reception set top box. Although in this notice Customs is specifically referring to one ruling (NY G82574), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No additional rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or to the importer's or Customs' previous interpretation of the HTSUS. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in

this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of the proposed action.

In NY G82574, dated October 3, 2000 (Attachment A), Customs classified a set top box which is used only for cable television reception in subheading 8528.12.92, HTSUS, as a set top box which has a communications function. This provision was adopted pursuant to the Information Technology Agreement (ITA), which went into effect on July 1, 1997, by Presidential Proclamation No. 7011 (62 FR 35909 (July 2, 1997)). The agreement covers certain specified headings and subheadings, as well as specific products, wherever they fall to be classified. One of these specific products is a set top box which has a communications function. The ITA's description of the product is that it must be a microprocessor-based device with a modem for gaining access to the Internet and having a function of interactive information exchange.

The U.S. created two new subheadings, 8525.10.10 and 8528.12.92, in the HTSUS for "set top boxes which have a communications function." Customs considers the ITA description to provide the minimum requirements for qualification under the ITA. Because the set top box classified in NY G82574 is used only for cable television reception and has no modem for gaining access to the Internet, it does not satisfy the ITA requirements. Therefore, while it is a set top box, it is not a set top box which has a communications function of subheading 8528.12.92, HTSUS. Accordingly, it is classified in subheading 8528.12.97, HTSUS, which provides for other reception apparatus for television.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY G82574 (Attachment A), and any other ruling not specifically identified, to reflect the proper classification of the subject merchandise or substantially similar merchandise, pursuant to the analysis set forth in HQ 966799 (Attachment B). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical merchandise. Before taking this action, we will give consideration to any written comments timely received.

Dated: January 16, 2004

John Elkins for MYLES B. HARMON,  
*Director,*  
*Commercial Rulings Division.*

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.  
BUREAU OF CUSTOMS AND BORDER PROTECTION,

NY G82574

October 3, 2000

CLA-2-85:RR:NC:1:108 G82574

CATEGORY: Classification

TARIFF NO.: 8528.12.92000

MS. MADELINE B. KUFLIK  
PANASONIC  
*One Panasonic Way 3B-6*  
*Secaucus, New Jersey 07094*

RE: The tariff classification of a set top terminal.

DEAR MS. KUFLIK:

In your letter dated September 27, 2000, on behalf of Matsushita Television and Network Systems, you requested a tariff classification ruling.

The item in question is described as a set top terminal; specifically model number TZ-PCD2000, designed for use with cable television broadcasts.

The set top terminal is equipped with a tuner and is designed to receive both analog (NTSC) and digital (QAM) cable television broadcast signals via a RF cable. The tuner receives, demodulates and converts the television broadcast signal for direct viewing on to the television set. This model has the capability to communicate by sending a signal back to the cable headend via the same RF cable. This particular model does not incorporate a modem and has output terminals for both composite video and S-video signals.

The applicable subheading for the set top terminal, model TZ-PCD2000 will be 8528.12.9200, Harmonized Tariff Schedule of the United States (HTS), which provides for Reception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors: Reception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus: Other: Set top boxes which have a communications function. The rate of duty will be free.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Michael Contino at 212-637-7039.

ROBERT B. SWIERUPSKI,

*Director,*

*National Commodity Specialist Division.*

## [ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY,  
BUREAU OF CUSTOMS AND BORDER PROTECTION,

**HQ 966799**

**CLA-2 RR:CR:GC 966799 DBS**

**CATEGORY: Classification**

**TARIFF NO.: 8528.12.97**

MS. MADELINE B. KUFLIK  
PANASONIC  
*One Panasonic Way 3B-6*  
*Secaucus, NJ 07094*

RE: Revocation of NY G82574; set top boxes; Information Technology Agreement

DEAR MS. KUFLIK:

On October 3, 2000, the National Commodity Specialist Division of this office issued to you on behalf of Matsushita Television and Network Systems New York (NY) G82574, which classified a set top terminal in subheading 8528.12.92, Harmonized Tariff Schedule of the United States (HTSUS). We have reconsidered NY G82574 and the additional information sent to Customs on October 30, 2003, and have determined the classification to be incorrect.

**FACTS:**

In NY G82574 the product at issue, a set top box (set top terminal) identified as model TZ-PCD2000, was described as follows:

The set top terminal is equipped with a tuner and is designed to receive both analog (NTSC)) and digital (QAM) cable television broadcast signals via a RF cable. The tuner receives, demodulates and converts the television broadcast signal for direct viewing on to the television set. This model has the capability to communicate by sending a signal back to the cable headend via the same RF cable. This particular model does not incorporate a modem and has output terminals for both composite video and S-video signals.

In review of the treatment of set top boxes Customs has previously classified, Panasonic was asked to provide additional information to Customs regarding the model TZ-PCD2000 set top box. Additional facts presented pertinent to this ruling include that the box is only used for cable television reception. It has an out of band (OOB) communications link that is used by the cable company to authenticate the cable box in the cable system and is used by the customer to order pay-per-view. You stated that the box does not have any Internet capability.

**ISSUE:**

Whether the classification of the TZ-PCD2000 set top box falls in subheading 8528.12.92, HTSUS, as a set top box which has a communications function, or in subheading 8528.12.97, HTSUS, as other reception apparatus for television.

**LAW AND ANALYSIS:**

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of

goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be utilized. ENs, though not dispositive or legally binding, provide commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. Customs believes the ENs should always be consulted. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

**8528** Reception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors:

Reception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus:

8528.12 Color:

Other:

Other:

Other:

8528.12.92 Set top boxes which have a communications function

\* \* \*

8528.12.97 Other

We affirm that the set top box at issue is reception apparatus for television at GRI 1. Therefore, classification at the heading level is not at issue. Once the heading is no longer at issue, we turn to GRI 6, which provides:

For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

When the Information Technology Agreement (ITA) went into effect on July 1, 1997, pursuant to Presidential Proclamation No. 7011 (62 FR 35909 (July 2, 1997)), the U.S. created various new provisions to implement the agreement. The amendments set forth in Presidential Proclamation No. 7011 are based on the framework established in the Declaration on Trade in Information Technology Products, which, together with its Annex, constitute the ITA. See 62 FR 35909, para. 1. The Annex is comprised of two attachments. Attachment A, Section 1 lists the Harmonized System (HS) headings

and subheadings covered by the ITA. (The HS is the international agreement on which the HTSUS is based.) Attachment A, Section 2 lists certain semiconductor manufacturing and testing equipment and parts thereof to be covered by the ITA. Attachment B is a positive list of specific products to be covered by the ITA *wherever they are classified in the HS* (emphasis added). See Attachment A and Attachment B, Annex of the ITA.

Among the amendments adopted by the U.S. were two new subheadings for "set top boxes which have a communications function." One is found under heading 8525, HTSUS, which provides in relevant part for transmission apparatus for radiotelephony, radiotelegraphy, radiobroadcasting or television. The other is under heading 8528, HTSUS, enumerated above. The tariff term "set top boxes which have a communication function" is found in the positive list of specific products set forth in Attachment B. The type of product intended to be covered by the ITA is described as "a microprocessor-based device incorporating a modem for gaining access to the Internet, and having a function of interactive information exchange." Presidential Proclamation No. 7011. Therefore, Customs considers this description to provide the minimum requirements for a set top box to be classified as "set top boxes which have a communications function."

The ITA requires that these set top boxes be microprocessor-based devices. That is, they must contain a microprocessor. In addition to a microprocessor, the ITA requires that these set top boxes incorporate a modem for gaining access to the Internet. Modems are devices that transmit digital data by modulating and demodulating a signal. A modem alone does not provide access to the Internet. In simple terms, to gain access to the Internet, a modem is used to connect to an Internet Service Provider (ISP), and the ISP connects the user to the Internet. Hence, the ITA requires that these microprocessor-based set top boxes must be able to gain access to the Internet, not simply incorporate a modem.

The ITA also requires that this class of set top boxes has a function of interactive information exchange. As the Internet provides a user with the ability to have interactive information exchange, Customs considers the existence of a modem for gaining access to the Internet to indicate that a set top box has a function of interactive information exchange. Other factors, such as an RJ11 telephone jack, may also be indicative of interactive information exchange.

It is unclear from the facts provided whether the instant set top box is a microprocessor-based device. However, the model TZ-PCD2000 set top box it is designed only for cable television reception. It does not have a modem or any other means to gain access to the Internet. Without access to the Internet, it does not satisfy the ITA requirements of a "set top box which has a communications function." Therefore, it is inconsequential that it may have a function of interactive information exchange via the OOB channel. Accordingly, it is not classified in subheading 8528.12.92, HTSUS.

In the event that merchandise is not found to be classifiable under a specific subheading, it is then classified as "other." The "other," or "basket," provision of a subheading should be used only if there is no tariff category that more specifically covers the merchandise. See *DMV USA v. United States*, Slip. Op. 2001-99, 9 (C.I.T. August 10, 2001), citing *Rollerblade, Inc. v. United States*, 116 F. Supp. 2d 1247, 1251 (C.I.T. 2000); see also GRI 3(a) ("The heading which provides the most specific description shall be preferred to headings providing a more general description."). As there is no

specific provision for a set top box that is reception apparatus for television but does not satisfy the requirements of the ITA, it falls to be classified in subheading 8528.12.97, HTSUS.

This decision is consistent with Headquarters Ruling Letter (HQ) HQ 966742, dated December 15, 2003, in which we discussed the ITA requirements and classified a set top box that satisfied them in subheading 8528.12.92, HTSUS. *See also* HQ 966669, dated January 12, 2004. In addition, the set top box here is factually distinguishable from other set top boxes Customs has classified in subheading 8528.12.92, HTSUS, in rulings such as NY 187893, dated October 31, 2002, NY D82241, dated September 28, 1998 and NY F80216, dated December 14, 1999, because the set top boxes in those rulings all have modems and can access the Internet.

For the foregoing reasons, we find NY G82574 to be incorrect.

#### **HOLDING:**

The set top box model TZ-PCD2000 is classified in subheading 8528.12.97, HTSUS, which provides for "Reception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors: Reception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus: Color: Other: Other: Other: Other."

#### **EFFECT ON OTHER RULINGS:**

NY G82574, dated October 3, 2000, is hereby REVOKED.

MYLES B. HARMON,  
*Director,*  
*Commercial Rulings Division.*

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### **PROPOSED REVOCATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF BLACKOUT DRAPERY FABRIC**

**AGENCY:** Bureau of Customs & Border Protection; Department of Homeland Security.

**ACTION:** Notice of proposed revocation of two tariff classification ruling letters and revocation of treatment relating to the classification of blackout drapery fabric.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs & Border Protection (CBP) intends to revoke two ruling letters relating to the tariff classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) of blackout drapery fabric. Similarly, CBP proposes to revoke any treatment previously accorded by it to substantially identical merchandise. Comments are invited on the correctness of the intended actions.

**DATE:** Comments must be received on or before March 5, 2004.

**ADDRESS:** Written comments are to be addressed to Customs and Border Protection, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at Customs and Border Protection, 799 9th Street, N.W., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572-8768.

**FOR FURTHER INFORMATION CONTACT:** Beth Safeer, Textiles Branch: (202) 572-8825.

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to revoke two ruling letters relating to the tariff classification of blackout drapery fabric. Although in this notice CBP is specifically referring to the revocation of NY H81427, dated August 15, 2001 (Attachment A), and HQ 965343, dated July 30, 2002, (Attachment B), this notice covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing data bases for rulings in addition to the ones identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, a ruling letter, internal advice memorandum

or decision or protest review decision) on the merchandise subject to this notice, should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625 (c)(2)), as amended by section 623 of Title VI, CBP intends to revoke any treatment previously accorded by CBP to substantially identical merchandise. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or CBP's previous interpretation of the HTSUSA. Any person involved with substantially identical merchandise should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical merchandise or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice. In NY H81427, and HQ 965343, CBP classified blackout drapery fabric under subheading 5903.90.2500 HTSUSA, which provides for "Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Of man-made fibers: Other: Other." Based on our analysis of the scope of the terms of headings 5903 and 5907, the Legal Notes, and the Explanatory Notes, we find that blackout drapery fabric of the type subject to this notice, should be classified in subheading 5907.00.6000, HTSUS, which provides for "Textile fabrics otherwise impregnated, coated or covered; painted canvas being theatrical scenery, studio back-cloths or the like: Other: Of man-made fibers."

Pursuant to 19 U.S.C. 1625 (c)(1), CBP intends to revoke NY H81427, HQ 965343, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed Headquarters Ruling Letter (HQ) 966508 (Attachment C). Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP intends to revoke any treatment previously accorded by CBP to substantially identical merchandise.

Before taking this action, consideration will be given to any written comments timely received.

**DATED:** January 16, 2004

Gail A. Hamill for MYLES B. HARMON,  
*Director,*  
*Commercial Rulings Division.*

Attachments

## [ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.  
BUREAU OF CUSTOMS AND BORDER PROTECTION,  
NY H81427  
August 15, 2001  
CLA-2-59:RR:NC:TA:350 H81427  
CATEGORY: Classification  
TARIFF NO.: 5903.90.2500

Ms. KAY MCGAHA  
D.J. POWERS Co., INC.  
1809 E Associates Lane  
Charlotte, NC 28217

RE: The tariff classification of acrylic coated, woven textile black-out drapery lining material (Roc-Lon® Blackout), for use in Motel/Hotel furnishings, from either France or Germany.

DEAR Ms. MCGAHA:

You requested a classification ruling in your initial letter dated May 9, 2001, on behalf of Rockland Industries, which was returned to you and later resubmitted on May 30, 2001 with more information.

Two representative samples were submitted (white in color) differing mainly in their respective weights (thicknesses). The product, Roc-lon®, is described in the literature as "Blackout" 3-pass and "Budget Blackout" 2-pass and identified on the samples as Textralon B/O F/R, and Budget B/O F/R, respectively. You described them in your correspondence as being of a "base cloth of 70% polyester/30% cotton construction and having a rubber like backing on the back with an acrylic coating and 100% cotton flocking."

These drapery materials are available in a variety of colors and will be imported as roll goods having 54" (137 cm) widths. You indicate that similar materials are also available in 48" (122 cm), 54" (137 cm) and 110" (280 cm) widths. These materials, being used as drapery materials, according to your documentation, have the advantages of better light control, improved acoustical properties, holds up better after dry cleaning than other materials and resists cracking and peeling, etc.

It was noted, from observation, that there was a black colored layer between the textile surface or layer and a white layer on the other surface. Your letter made mention of a "rubber like" backing and cotton flocking, neither of which were apparent from the samples, thus the reason for sending the samples to the lab.

The New York Customs laboratory analyzed the two samples and found them to be constructed of woven base fabrics composed predominately of polyester man-made fibers. The samples are coated on one side with an acrylic polymer, both the white and black layers, which is a plastics material. The laboratory found traces of cotton flock on the outer plastic surfaces. However, the flock is not visible to the naked eye. In neither instance, does the plastics coating appear to be over 70 percent by weight of the total weight of either material.

The applicable subheading for the material will be 5903.90.2500, Harmonized Tariff Schedule of the United States (HTS), which provides for textile fabrics impregnated, coated, covered or laminated, with plastics, . . . of man-made fibers, not over 70 percent by weight of rubber or plastics. The duty rate will be 7.8 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist George Barth at 212-637-7085.

ROBERT B. SWIERUPSKI,

*Director,*

*National Commodity Specialist Division.*

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[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.

BUREAU OF CUSTOMS AND BORDER PROTECTION,

HQ 965343

July 30, 2002

CLA-2 RR:CR:TE 965343 ttd

CATEGORY: Classification

TARIFF NO.: 5903.90.2500

Ms. MARION SITTON  
D.J. POWERS CO., INC.  
1809 E. Associates Lane  
Charlotte, NC 28217

DEAR Ms. SITTON:

This is in reference to your letter of December 3, 2001, on behalf of Rockland Industries, requesting reconsideration of New York Ruling Letter (NY) H81427, dated August 15, 2001, regarding the classification of woven textile blackout drapery lining material under the Harmonized Tariff System of the United States Annotated (HTSUSA). Your letter, which was originally submitted to the Customs National Commodity Specialist Division in New York, was referred to this office for reply. After review of NY H81427, Customs has determined that the classification of the blackout drapery lining material in subheading 5903.90.2500, HTSUSA, was correct. For the reasons that follow, this ruling affirms NY H81427.

FACTS:

On May 30, 2001, you submitted two samples, identified as Blackout and Budget Blackout, to the National Commodity Specialist Division (NCSD) in New York and requested a classification ruling, on behalf of Rockland Industries. In New York ruling letter (NY) H81427, dated August 15, 2001, both samples were classified in subheading 5903.90.2500, under the Harmonized Tariff Schedule of the

United States (HTSUS). Subheading 5903.90.2500 provides for textile fabrics impregnated, coated covered or laminated, with plastics, . . . of man-made fibers, not over 70 percent by weight of rubber or plastics.

In NY H81427, the merchandise was described as follows:

Two representative samples were submitted (white in color) differing mainly in their respective weights (thicknesses [sic]). The product Roc-lon®, is described in the literature as "Blackout" 3-pass and "Budget Blackout" 2-pass and identified on the samples as Textralon B/O F/R, and Budget B/O F/R, respectively. You described them in your correspondence as being of a "base cloth of 70% polyester/30% cotton construction and having a rubber like backing on the back with an acrylic coating and 100% cotton flocking.

These drapery materials are available in a variety of colors and will be imported as roll goods having 54" (137 cm) widths. You indicate that similar materials are also available in 48" (122 cm) 54" (137 cm) and 110" (280 cm) widths. These materials, being used as drapery materials, according to your documentation, have the advantages of better light control, improved acoustical properties, holds up better after dry cleaning than other materials and resists cracking and peeling, etc.

It was noted, from observation, that there was a black colored layer between the textile surface or layer and white layer on the other surface. Your letter made mention of a "rubber like" backing and cotton flocking, neither of were apparent from the samples, thus the reason for sending the samples to the lab.

The New York Customs laboratory analyzed the two samples and found them to be constructed of woven base fabrics composed predominately of polyester man-made fibers. The samples are coated on one side with an acrylic polymer, both the white and black layers, which is a plastics material. The laboratory found trace of cotton flock on the outer plastic surfaces. However, the flock is not visible to the naked eye. In neither instance, does the plastics coating appear to be over 70 percent by weight of the total weight of either material.

In your letter, you submitted "supportive documentation" claiming that plastic was not used in manufacturing the drapery material. You included a letter from Rockland Industries, Inc., dated July 20, 1998, which described the material under consideration as a "self-crosslinking acrylic emulsion for textile applications."

We note that at the time NY H81427 was issued, Customs presumed, absent any information to the contrary, that the subject merchandise was to be imported into the United States. After NYRL H81427 was issued, the Customs Service was informed that the material is for export and not import purposes.

#### LAW AND ANALYSIS:

Classification under the HTSUSA is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes. . . ."

In the event that goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes (EN) constitute the official interpretation of the Harmonized System at the international level (for the 4 digit headings and the 6 digit subheadings) and facilitate classification under the HTSUSA by offering guidance in understanding the scope of the headings and GRI. While neither legally binding nor dispositive of classification issues, the EN provide commentary on the scope of each heading of the HTSUSA and are generally indicative of the proper interpretation of the headings. See T.D. 89-80, 54 Fed. Reg. 35127-28 (Aug. 23, 1989).

Proper classification of the subject merchandise rests on whether the coating on the woven fabric is considered a plastic. Chapter 39, HTSUSA, covers plastics and articles thereof. Note 1 to chapter 39 states:

1. Throughout the tariff schedule the expression "plastics" means those materials of heading 3901 to 3914 which are or have been capable, either at the moment of polymerization or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticizer) by molding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence.

Within Chapter 39, heading 3906 provides for "Acrylic polymers in primary forms." Note 6 to Chapter 39 further provides that in headings 3901 to 3914, the expression "primary forms" applies to the following forms:

- (a) Liquids and pastes, including dispersions (emulsions and suspensions) and solutions;
- (b) Blocks of irregular shape, lumps, powders (including molding powders), granules, flakes and similar bulk forms.

After analyzing the two samples at issue, the New York Customs laboratory found each to be constructed of woven base fabrics composed predominately of polyester man-made fibers. The laboratory also found that the samples are coated on one side with an acrylic polymer, which is considered a plastics material. As an acrylic polymer, the subject material that coats the fabric is specifically named in heading 3906, HTSUSA. Moreover, acrylic polymer emulsions are properly considered to be "primary forms" as defined by Note 6(a) to chapter 39 above. Therefore, when classified on its own, absent the woven base fabrics, the acrylic polymer falls squarely within the scope of heading 3906, HTSUSA, which provides for "Acrylic polymers in primary forms." See Headquarters Ruling Letter (HQ) 964704, dated April 11, 2001, wherein Customs classified an acrylic polymer in subheading 3906, HTSUSA, as an acrylic polymer in primary forms.

As the subject acrylic polymer emulsion is properly considered a plastics material, we must next determine the proper classification

of the acrylic polymer emulsion combined with the woven base fabrics of polyester and cotton. Heading 5903, HTSUSA, provides for "Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902." Note 2 to chapter 59 provides that heading 5903 applies to:

(a) Textile fabrics, impregnated, coated covered or laminated with plastics, whatever the weight per square meter and whatever the nature of the plastic material (compact or cellular), other than:

(1) Fabrics in which the impregnation, coating or covering cannot be seen with the naked eye (usually chapters 50 to 55, 58 or 60); for the purpose of this provision, no account should be taken of any resulting change of color;

(2) Products which cannot, without fracturing, be bent manually around a cylinder of a diameter of 7 mm, at a temperature between 15°C and 30°C (usually chapter 39);

(3) Products in which the textile fabric is either completely embedded in plastics or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of color (chapter 39);

(4) Fabrics partially coated or partially covered with plastics and bearing designs resulting from these treatments (usually chapters 50 to 55, 58 or 60);

(5) Plates, sheets or strip of cellular plastics, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes (chapter 39); or

(6) Textile products of heading 5811.

As set forth above, the subject acrylic polymer is not within the scope of heading 5902, HTSUSA, which covers "Tire cord fabric . . ." Moreover, none of the six exceptions to note 2(a) to chapter 59, preclude the subject merchandise from classification in heading 5903, HTSUSA. Accordingly, the subject merchandise is properly classified under subheading 5903.90.2500, HTSUSA, which provides, in part, for "Textile fabrics impregnated, coated, covered or laminated with plastics, . . . of man-made fibers, not over 70 percent by weight of rubber or plastics."

In your letter, you contend that the woven fabric is not covered with a plastic material. You submitted a letter from Rockland Industries, Inc. in which the company contends that "[a]t no time in the manufacturing of this new Blackout lining is any form of PVC or plastic utilized." However, this general claim falls short of disqualifying the subject coating material applied to one face the woven fabric from fulfilling the definition of a plastic as defined by the tariff.

Based on Rockland Industries, Inc. own description, the coating on the woven fabric is a "self-crosslinking acrylic emulsion." The Customs laboratory concurs with this description that the coating is an acrylic polymer, which, as described above, is properly considered to be a plastic. Therefore, the merchandise is classified in

heading 5903, HTSUSA, which provides, in part, for "Textile fabrics impregnated, coated, covered or laminated with plastics . . ."

**HOLDING:**

The subject merchandise is properly classified in subheading 5903.90.2500, HTSUSA, which provides for "Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Of man-made fibers: Other: Other." The current applicable general column one rate of duty is 7.7 percent ad valorem. The textile restraint category is 229. There are no applicable quota/visa requirements for the products of World Trade Organization (WTO) members. The textile category number above applies to merchandise produced in non-WTO countries.

NY H81427, dated August 15, 2001, is hereby **AFFIRMED**.

The designated textile and apparel category may be subdivided into parts. If so, the visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest you check, close to the time of shipment, the Status Report On Current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service which is updated weekly and is available for inspection at your local Customs office. The Status Report on Current Import Quotas (Restraint Levels) is also available on the Customs Electronic Bulletin Board (CEBB) which can be found on the U.S. Customs Service Website at [www.customs.gov](http://www.customs.gov).

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

MYLES B. HARMON,  
*Acting Director,*  
*Commercial Rulings Division.*

## [ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY.  
BUREAU OF CUSTOMS AND BORDER PROTECTION,  
HQ 966508  
CLA-2 RR:CR:TE 966508 BAS  
CATEGORY: Classification  
TARIFF NO.: 5907.00.6000

ROBERT A. SHAPIRO  
BARNES, RICHARDSON & COLBURN  
1420 New York Avenue, N.W.  
Suite 700  
Washington, D.C. 20005

RE: Reconsideration of HQ 965343, dated July 30, 2002 and NY H81427,  
dated August 15, 2001; Classification of Blackout Drapery Fabric

DEAR MR. SHAPIRO:

This is in reply to your letter, dated May 27, 2003, on behalf of Rockland Industries, Inc., (Rockland) requesting reconsideration of Headquarters Ruling Letter (HQ) 965343, dated July 30, 2002, and New York Ruling Letter (NY) H81427, dated August 15, 2001, concerning the tariff classification of the Roc-Lon blackout drapery fabric (BDL). You provided us with a sample to assist us in our determination.

## FACTS:

In New York Ruling letter (NY) H81427, dated August 15, 2001, two samples, of Blackout and Budget Blackout Draperies, were classified in subheading 5903.90.2500, under the Harmonized Tariff Schedule of the United States (HTSUS). Subheading 5903.90.2500, HTSUSA, provides for man-made fiber textile fabrics impregnated, coated, covered or laminated with plastics not over 70 percent by weight of rubber or plastics.

In NY H81427, the merchandise was described as follows:

Two representative samples were submitted (white in color) differing mainly in their respective weights (thicknesses [sic]). The product Roc-lon®, is described in the literature as "Blackout" 3-pass and "Budget Blackout" 2-pass and identified on the samples as Textralon B/O F/R, and Budget B/O F/R, respectively. You described them in your correspondence as being of a "base cloth of 70% polyester/30% cotton construction and having a rubber like backing on the back with an acrylic coating and 100% cotton flocking."

These drapery materials are available in a variety of colors and will be imported as roll goods having 54" (137 cm) widths. You indicated that similar materials are also available in 48" (122 cm), 54" (137 cm) and 110" (280 cm) widths. These materials, being used as drapery materials, according to your documentation, have the advantages of better light control, improved acoustical properties, holds up better after dry cleaning than other materials and resists cracking and peeling, etc.

It was noted, from observation, that there was a black colored layer between the textile surface or layer and white layer on the other surface. Your letter made mention of a "rubber like" backing and cotton flocking, neither of which were apparent from the samples.

On July 30, 2002, this office issued HQ 965343, in which we affirmed NY H81427 and classified the subject merchandise in subheading 5903.90.2500, HTSUSA, which provides for "Textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902: Other: Of man-made fibers: Other: Other."

On May 27, 2003, you submitted a detailed description of the production process used to produce the Roc-Lon BDL and requested reconsideration of HQ 965343. Specifically, you noted that the Roc-Lon BDL is coated with a mixture of clay, titanium dioxide, carbon black, flame retardant, acrylic and textile flock. You provided us with a new sample of the Budget Blackout White/White. The new sample appears to be the same as the Budget Blackout at issue in HQ 965343. You argue that the Roc-Lon BDL is properly classifiable in heading 5907, HTSUSA. We note that the request for a classification determination is for the purpose of export of the blackout draperies. General Note 5, HTSUSA, indicates that the statistical reporting numbers for articles classified in Chapters 1 through 97 of the HTSUSA may be used in place of comparable Schedule B numbers on the Shipper's Export Declaration.

#### ISSUE:

Is the subject blackout drapery fabric classified under heading 5903 which covers textile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902; or under heading 5907, HTSUSA, as a textile fabric otherwise impregnated, coated or covered?

#### LAW AND ANALYSIS:

##### HEADING 5903, HTSUSA

While your initial correspondence did not address the nature of the plastic material, your submission of May 27, 2003 stated that the plastic used in the drapery fabric is in the form of a foam. Notably the manufacturer's website, [www.roc-lon.com](http://www.roc-lon.com) also indicates that the plastic utilized is in the form of acrylic foam. The nature of the plastic, which was not at issue in HQ 965343 is a determining factor in analyzing the classification issue. Accordingly, we sent the new sample to the New York Customs and Border Protection Laboratory in order to determine whether the plastic was cellular or non-cellular. The Laboratory Report Number NY 20032178, states that the coating is composed of an acrylic type cellular plastic material which has cotton flocking fibers covering the exterior surface.

Classification of goods under the HTSUS is governed by the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. Since the blackout drapery is composed of a textile and plastic combination we focus upon Chapter 39 which covers plastics and articles thereof and Chapter 59 which covers impregnated, coated, covered or laminated textile fabrics. We begin our analysis with a review of Section VII which encompasses Chapter 39. Section VII deals with plastics and articles thereof, rubber and articles thereof. There are no applicable Section notes. Next we review Chapter 39 (plastics and articles thereof). Chapter Note 2(m) states that the chapter does not cover goods of Section XI (textiles and textile articles). The Explanatory Notes to the Harmonized Commodity Description and Coding System ("ENs"), which represent the official interpretation of the tariff at the international level, facilitate the classification under the HTSUS by offering guidance in

understanding the scope of the headings and GRI. The Explanatory Notes to Chapter 39 state that the classification of plastic and textile combinations is essentially governed by Note 1(h) to Section XI, Note 3 to Chapter 56 and Note 2 to Chapter 59.

Note 1(h) to Section XI (textiles and textile articles) states that the section does not cover woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, or articles thereof, of Chapter 39. Thus it is necessary to determine what plastic covered or laminated fabrics are covered by Chapter 39.

The ENs to Chapter 39 state that the following plastic and textile combination products are covered by Chapter 39:

- (a) Felt impregnated, coated, covered or laminated with plastics, containing 50% or less by weight of textile material or felt completely embedded in plastics;
- (b) Textile fabrics and nonwovens, either completely embedded in plastics or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of colour;
- (c) Textile fabrics, impregnated, coated, covered or laminated with plastics, which cannot, without fracturing, be bent manually around a cylinder of a diameter of 7 mm, at a temperature between 15°C and 30°C;
- (d) Plates, sheets and strip of cellular plastics combined with textile fabrics, felt or nonwovens, where the textile is present merely for reinforcing purposes.

In this respect unfigured, unbleached, bleached or uniformly dyed textile fabrics, when applied to one face only of these plates, sheets or strip, are regarded as serving merely for reinforcing purposes. Figured, printed or more elaborately worked textiles (e.g., by raising) and special products . . . , are regarded as having a function beyond that of reinforcement.

Although the acrylic component of the drapery fabric is cellular, it does not squarely meet the description in (d) of the Chapter 39 ENs cited above, because the plastic is covered with another material (the flock) and based on the analysis which follows, the Bureau of Customs and Border Protection (CBP) believes it is properly classified as a fabric of 5907, and as such is excluded from Chapter 39, by virtue of Note 2(m), Chapter 39. See HQ 961390, dated April 19, 2001.

We note that Note 1(h) does not preclude the classification of the blackout drapery in Section XI.

Next, the governing notes direct us to Note 3 to Chapter 56. Note 3 states that Headings 5602 and 5603 cover felts and nonwovens, respectively, that are coated or laminated with plastics. Since the material at issue does not involve felt or nonwoven material, Note 3, Chapter 56, is inapplicable.

Note 2(a) to Chapter 59 states that Heading 5903, HTSUS, applies to textile fabrics, impregnated, coated, covered, or laminated with plastics, whatever the weight per square meter and whatever the nature of the plastic material (compact or cellular) other than the following six exceptions:

- (1) Fabrics in which the impregnation, coating or covering cannot be seen with the naked eye (usually chapters 50 to 55, 58 or 60); for the

purpose of this provision, no account should be taken of any resulting change in color;

(2) Products which cannot, without fracturing, be bent manually around a cylinder of a diameter of 7 mm, at a temperature between 15°C and 30°C (usually Chapter 39);

(3) Products in which the textile fabric is either completely embedded in plastics or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of color (chapter 39);

(4) Fabrics partially coated or partially covered with plastics and bearing designs resulting from these treatments (usually Chapters 50 to 55, 58 or 60);

(5) Plates, sheets or strip of cellular plastics, combined with textile fabric, where the textile fabric is merely present for reinforcing purposes (Chapter 39); or

(6) Textile products of heading 5811.

The subject material seems to be described, at least in part, in exemption 5 above. We note however that the nature of the material (woven fabric, cellular plastics, flock) is not described in Note 2(a) above. Although the woven drapery fabric is combined with a sheet of cellular plastics, the sheet is covered with flock. The flock serves as part of the covering or coating material of the finished fabric.

Heading 5907 covers textile fabrics that have been impregnated, coated or covered, with materials other than plastics or rubber, provided the impregnation, coating or covering can be seen with the naked eye.

The ENs to Heading 5907, HTSUS, specifically lists flocked fabrics stating:

The fabrics covered here include:

(G) Fabric, the surface of which is coated with glue (rubber glue or other), plastics, rubber or other materials and sprinkled with a fine layer of other materials such as:

(1) Textile flock or dust to produce imitation suedes. . . .

The blackout drapery at issue is constructed of a woven fabric, covered with a cellular plastic, which is itself covered on the outside surface with cotton flocking fibers.

The blackout drapery fabric therefore meets the description of a textile fabric otherwise impregnated, covered or coated of Heading 5907, HTSUS. Accordingly, the blackout drapery fabric is classified as a fabric under Heading 5907, HTSUS. We note that as the textile and plastic combination is found to be classifiable in Chapter 59, it is excluded from classification in Chapter 39.

This ruling is consistent with other rulings in which "three flocked" blackout liner materials for use in the manufacture of draperies have been classified in heading 5907, HTSUSA, and in which a foamed PVC jacket shell covered with textile flock was determined to be of a fabric of 5907, HTSUSA. HQ 961390, April 19, 2001; NY G88375, dated March 27, 2001.

The final step in the analysis requires a determination as to whether the blackout drapery fabric is appropriately classified under 5907.00.60, HTSUSA, which provides for "Textile fabrics otherwise impregnated, coated or covered . . . Of man-made fibers" or under subheading 5907.00.80, HTSUSA, which provides for "Textile fabrics otherwise impregnated, coated or covered . . . Other".

Subheading Note 2(A) to Section XI of the HTSUSA states the following:

Products of chapters 56 to 63 containing two or more textile materials are to be regarded as consisting wholly of that textile material which would be selected under note 2 to this section for the classification of a product of chapters 50 to 55 or of heading 5809 consisting of the same textile materials.

Subheading Note 2(B) to Section XI of the HTSUSA states in relevant part that for application of Note 2(A):

(a) Where appropriate, only the part which determines the classification under general interpretative rule 3 shall be taken into account;

In the instant case, it is the fabric component of the blackout drapery that determines its classification, not the coating or the flocking. Accordingly, in determining the appropriate subheading we evaluate only the fabric component.

Note 2(A) to Section XI reads in relevant part:

Goods classifiable in chapters 50 to 55 or in heading 5809 or 5902 and a mixture of two or more textile materials are to be classified as if consisting wholly of that one textile material which predominates by weight over each other single textile material.

\* \* \*

As the textile component of the blackout drapery is 70 percent polyester and 30 percent cotton, it is properly classifiable in subheading 5907.00.6000, HTSUSA, which provides for "Textile fabrics otherwise impregnated, coated or covered; painted canvas being theatrical scenery, studio back-cloths or the like: Other: Of man-made fibers."

#### **HOLDING:**

The blackout drapery fabric is classifiable in subheading 5907.00.6000, HTSUSA, which provides for "Textile fabrics otherwise impregnated, coated or covered; painted canvas being theatrical scenery, studio back-cloths or the like: Other: Of man-made fibers." HQ 965343, dated July 30, 2002 and NY H81427, dated August 15, 2001 are hereby revoked.

MYLES B. HARMON,  
*Director,*  
*Commercial Rulings Division.*

**19 CFR PART 177****PROPOSED REVOCATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF A BARBECUE AND APRON SET**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of proposed revocation of a ruling letter and treatment relating to tariff classification of a barbecue and apron set.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of a barbecue and apron set under the Harmonized Tariff Schedule of the United States ("HTSUS"). Customs also intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the proposed action.

**DATE:** Comments must be received on or before March 5, 2004.

**ADDRESS:** Written comments (preferably in triplicate) are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at Customs and Border Protection, 799 9th Street, N.W., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 572-8768.

**FOR FURTHER INFORMATION CONTACT:** Neil S. Helfand, General Classification Branch, (202) 572-8791.

**SUPPLEMENTARY INFORMATION:****Background**

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on

Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the classification of a barbecue and apron set. Although in this notice Customs is specifically referring to one ruling, NY F84298, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs intends to modify any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In NY F84298, dated March 24, 2000, set forth as Attachment A to this document, Customs classified a barbecue and apron set in two separate subheadings. The three utensils were classified under subheading 8215.20.00, HTSUS, as: "[s]poons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs and similar kitchen or tableware; and base metal parts thereof: [o]ther sets of assorted articles." The textile apron was classified under subheading 6211.42.00.81, HTSUS, as: "[t]rack suits, ski-suits and swimwear;

other garments: [o]ther garments, women's or girls'." [o]f cotton: [o]ther (359)."

It is now Customs position that the items comprise goods put up in a set for retail sale pursuant to GRI 3(b). The set is classified under subheading 8215.20.00, HTSUS, as "[s]poons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs and similar kitchen or tableware; and base metal parts thereof: [o]ther sets of assorted articles." Proposed HQ 966615 modifying NY F84298 is set forth as Attachment B.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to modify NY F84298 and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 966615. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to modify treatment previously accorded by Customs to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

**DATED:** January 16, 2004

John Elkins for MYLES B. HARMON,  
*Director,*  
*Commercial Rulings Division.*

Attachments

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[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.  
BUREAU OF CUSTOMS AND BORDER PROTECTION,  
NY F84298  
March 24, 2000  
CLA-2-82:RR:NC:N1:113 F84298  
CATEGORY: Classification  
TARIFF NO.: 6211.42.0081; 8215.20.0000

MS. CAROLE ZIMMER  
QUALITY CUSTOMS BROKERS, INC.  
2200 Landmeier Road  
Elk Grove, IL 60007

**RE:** The tariff classification of a barbecue set from China

**DEAR MS. ZIMMER:**

In your letter dated March 10, 2000, on behalf of Ace Products Management, you requested a tariff classification ruling.

The sample you provided is a Harley-Davidson Barbecue and Apron Set. The set contains tongs, a 2-tine fork and a turning spatula. Each utensil is made of steel with a wooden handle. The apron is a woven, 100% cotton, bib apron.

The applicable subheading for the barbecue utensils will be 8215.20.0000, Harmonized Tariff Schedule of the United States (HTS), which provides for spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs and similar kitchen or tableware, other sets of assorted articles. The rate of duty will be the rate of duty applicable to that article in the set subject to the highest rate of duty. In this case, the rate of duty will be that of heading 8215.995.5000 at 5.3 percent ad valorem.

The applicable subheading for the apron will be 6211.42.0081, Harmonized Tariff Schedule of the United States (HTS), which provides for other garments, of cotton. The rate of duty will be 8.3 percent ad valorem.

The apron falls within textile category designation 359. Based upon international textile trade agreements products of China are subject to quota and the requirement of a visa.

The designated textile and apparel categories may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Part categories are the result of international bilateral agreements, which are subject to frequent renegotiations and changes. To obtain the most current information available, we suggest that you check, close to the time of shipment, the Status Report on Current Import Quotas (Restraint Levels), an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist James Smyth at 212-637-7008.

ROBERT B. SWIERUPSKI,  
*Director,*  
*National Commodity Specialist Division.*

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.  
BUREAU OF CUSTOMS AND BORDER PROTECTION,

**HQ 966615**  
**CLA-2 RR:CR:GC 966615 NSH**  
**CATEGORY:** Classification  
**TARIFF NO.:** 8215.20.00

MS. CAROLE ZIMMER  
QUALITY CUSTOMS BROKERS, INC.  
2200 Landmeier Road  
Elk Grove, IL 60007

**RE:** NY F84298 revoked; Barbecue and apron set

DEAR MS. ZIMMER:

This letter is pursuant to U.S. Customs and Border Protection (Customs) reconsideration of NY F84298, dated March 24, 2000, on behalf of your client, Ace Products Management. We have reviewed the classification and have determined that it must be modified. This ruling letter sets forth the correct classification.

**FACTS:**

The subject merchandise is identified as a "Harley-Davidson Barbecue and Apron Set." It consists of tongs, a two-tine fork, a spatula and a textile bib apron for use in food preparation. Each of the three utensils is made of steel and has a wooden handle; the apron is woven and made of 100 percent cotton.

On March 24, 2000, Customs issued NY F84298, holding that the three utensils were classified as a set under subheading 8215.20.00, HTSUS, and the apron was separately classified under subheading 6211.42.0081, HTSUS.

**ISSUE:**

The first issue is whether a textile apron is classified as part of a set of utensils for use in food preparation.

If the textile apron is classified as part of the set, the second issue is whether its inclusion will affect the set's essential character, thereby causing it to be classified under a heading other than 8215, HTSUS.

**LAW AND ANALYSIS:**

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the remaining GRIs 2 through 6.

The Explanatory Notes (EN) to the Harmonized Commodity Description and Coding System represent the official interpretation of the tariff at the international level. The ENs, although neither dispositive or legally binding, facilitate classification by providing a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. See T.D. 89-80.

The HTSUS provisions under consideration are as follows:

6211	Track suits, ski-suits and swimwear; other garments: Other garments, women's or girls':
6211.42.00	Of cotton
6211.42.0081	Other (359)
* * * * *	
8215	Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs and similar kitchen or table- ware; and base metal parts thereof:
8215.20.00	Other sets of assorted articles
* * * * *	

In NY F84298, the articles at issue were classified under two subheadings. The three utensils were classified as a set under subheading 8215.20.00, HTSUS, and the apron was classified under subheading 6211.42.0081, HTSUS. The first issue is whether the apron is part of the set consisting of the three utensils. If the apron is not determined to be part of the set, the three utensils comprising the set shall be classified under subheading 8215.20.00, HTSUS, under the authority of GRI 1. However, if the apron is found to be part of the set, the second issue will be whether the inclusion of the apron will affect the set's essential character; that determination will dictate which subheading of the HTSUS the set will fall under.

GRI 3(a) states, in pertinent part, that when by application of rule 2(b) or for any other reason, goods are *prima facie* classifiable under two or more headings, the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer only to part of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods. In this case, because the apron at issue would be classified under heading 6211, HTSUS, if not included in the set, GRI 3(a) cannot be applied. GRI 3(b), however, applies to goods put up in sets for retail sale and is therefore applicable in examining whether the apron is part of the barbecue set.

With respect to classifying proposed sets under GRI 3(b), EN Rule 3(b) (X) states the following:

For purposes of this Rule, the term "goods put up in sets for retail sale" shall be taken to mean goods which:

- consist of at least two different articles which are, *prima facie*, classifiable in different headings . . . ;
- consist of products or articles put together to meet a particular need or carry out a specific activity; and
- are put up in a manner suitable for sale directly to users without repacking (e.g. in boxes or cases or on boards).

With respect to criteria (a), the three utensils and textile apron are classifiable in two distinct headings and thus satisfy the criteria. The tongs, two-

tine fork and spatula are all classified under heading 8215, HTSUS; the apron is classified under heading 6211, HTSUS.

- 1) The tongs are intended to be meat tongs such as would be used during barbecuing and other food preparation. Although heading 8215, HTSUS, uses the language "sugar tongs," EN 82.15 refers to "[s]ugar tongs of all kinds (cutting or not) . . . meat tongs . . ." As such, the tongs included in this set fall under heading 8215, HTSUS, specifically subheading 8215.90.50, HTSUS.
- 2) The "two-tine fork" is classified under heading 8215, HTSUS, specifically under heading 8215.99.24, HTSUS, which applies to "Table forks . . . and barbecue forks with wooden handles."
- 3) The spatula, although not listed under heading 8215, HTSUS, is classified therein, specifically under 8215.99.50, HTSUS, because it possesses the essential characteristics or common purpose as the other items set forth in the heading. See HQ 963975, dated July 10, 2000, holding that a spatula, although not listed among the exemplars under heading 8215, HTSUS, falls within the scope of the heading by the application of *ejusdem generis*.
- 4) The textile apron, the type in question being used to protect the wearer during food preparation, has repeatedly been held by Customs as classified under heading 6211, HTSUS, specifically subheading 6211.42.0081, HTSUS. See HQ 959450, dated April 7, 1997.

With respect to criteria (b), the four articles comprising the proposed set are combined to meet a particular need or carry out a specific activity. All four components contribute to the specific activity of food preparation. The tongs, two-tine fork and the spatula are hand held utensils used for the preparation of food, specifically the direct manipulation of food items. In regard to the apron, Customs believes that it is included in a set of barbecue utensils. See NY H83943. The bib apron at issue protects the wearer from barbecue spillage or grease spattering during the preparation of food. Even though the apron is not used to directly manipulate food items, as are the three utensils, its usefulness for protecting the wearer makes it a recognized and accepted item by the consumer for purposes of food preparation. Therefore, its use in conjunction with the utensils for the single purpose of food preparation is readily apparent. Although these items would have utility if sold separately, they are not multidimensional in that their usefulness is limited, and they are perceived to be limited to cooking activities.

With respect to criteria (c), it is not disputed that this set is being put up in a manner suitable for sale directly to users without repacking.

We therefore find that the subject goods constitute "goods put up in a set for retail sale" within the meaning of GRI 3(b). EN Rule 3(b) (X) directs that, if the items in question are considered a set, the classification is made according to the component, or components taken together, which can be regarded as conferring on the set as a whole its essential character. In this instance, the essential character of the set is imparted by the three utensils which are classified under subheading 8215.20.00, HTSUS, as: "Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs and similar kitchen or tableware; and base metal parts thereof: Other sets of assorted articles."

Notwithstanding the apron's inclusion as a constituent part of the set for classification purposes under GRI 3(b), the apron is a textile article and remains subject to visa and quota requirements, regardless of where the set is classified. The apron at issue falls within category 359.

**HOLDING:**

The barbecue utensils and the apron constitute a GRI 3(b) set and are classified under subheading 8215.20.00, HTSUS, as "Spoons, forks, ladles, skimmers, cake-servers, fish-knives, butter-knives, sugar tongs and similar kitchen or tableware; and base metal parts thereof: Other sets of assorted articles." The apron, which falls within category 359, will remain subject to visa and quota requirements regardless of where the set is classified.

**EFFECT ON OTHER RULINGS:**

NY F84298 is REVOKED.

MYLES B. HARMON,  
*Director,*  
*Commercial Rulings Division.*

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**19 CFR PART 177****PROPOSED REVOCATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF LIQUID 1,2-POLYBUTADIENE RUBBER (NISSO-PB B-1000)**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of proposed revocation of ruling letter and treatment relating to tariff classification of Liquid 1,2-Polybutadiene Rubber (NISSO PB-B 1000).

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of Liquid 1,2-Polybutadiene Rubber (NISSO PB-B 1000) under the Harmonized Tariff Schedule of the United States ("HTSUS"). Customs also intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the proposed action.

**DATE:** Comments must be received on or before March 5, 2004.

**ADDRESS:** Written comments (preferably in triplicate) are to be addressed to U.S. Customs and Border Protection, Office of Regula-

tions and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at Customs and Border Protection, 799 9th Street, N.W., Washington, D.C. during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 572-8768.

**FOR FURTHER INFORMATION CONTACT:** Michelle Garcia, General Classification Branch, (202) 572-8745.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the classification of Liquid 1,2-Polybutadiene Rubber (NISSO PB-B 1000). Although in this notice Customs is specifically referring to one ruling, NY 818016, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs intends to revoke any

treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In NY 818016 dated March 19, 1996, set forth as Attachment A to this document, Customs classified NISSO PB-B 1000 in subheading 3902.90.00, HTSUS, as: "Polymers of propylene or of other olefins, in primary forms: Other." It is now Customs position that NISSO PB-B1000 is classified in subheading 4002.20.00, HTSUS, as: "Synthetic rubber and factice derived from oils, in primary form or in plates, sheets, or strip. . . : Butadiene rubber (BR)." Proposed HQ 966558 revoking NY 818016 is set forth as Attachment B.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY 818016 and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 966558. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

**DATED:** January 16, 2004

John Elkins for MYLES B. HARMON,  
*Director,*  
*Commercial Rulings Division.*

Attachments

## [ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.  
BUREAU OF CUSTOMS AND BORDER PROTECTION,

NY 818016

March 19, 1996

CLA-2-39:RR:NC:FC:238 818016

CATEGORY: Classification

TARIFF NO.: 3902.90.0050

MR. MALVIE WYRE  
NISSHO IWAI AMERICA CORPORATION  
1211 Avenue of the Americas  
New York, NY 10036

RE: The tariff classification of Liquid 1,2-Polybutadiene Rubber  
(Nisso-PB B-1000) from Japan

DEAR MR. WYRE:

In your letter dated August 31, 1995, resubmitted in January of 1996, you requested a tariff classification ruling.

The subject product, Liquid 1,2-Polybutadiene Rubber (Nisso-PB B-1000), consists of a non-elastomeric other olefin type (polybutadiene) polymer. Based on a report issued by the U.S. Customs laboratory, at New York, to this office, the dumbbell-shaped samples submitted for testing did not meet the criteria for "synthetic rubber", as set forth in Note 4(a) to Chapter 40, HTSUSA.

The applicable subheading for the subject product will be 3902.90.0050, Harmonized Tariff Schedule of the United States (HTS), which provides for: "Polymers of propylene or of other olefins, in primary forms: Other: Other." The rate of duty will be 1.3 cents per kilogram plus 7.2 percent ad valorem.

This merchandise may be subject to the regulations of the Environmental Protection Agency, Office of Pesticides and Toxic Substances. You may contact them at 402 M Street, S.W., Washington, D.C. 20460, telephone number (202) 554-1404, or EPA Region II at (908) 321-6669.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist C. Reilly at 212-466-5770.

ROGER J. SILVESTRI,

Director,

National Commodity Specialist Division.

## [ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.  
BUREAU OF CUSTOMS AND BORDER PROTECTION,

**HQ 966558**  
**CLA-2 RR:CR:MG 966558 MG**  
**CATEGORY: Classification**  
**TARIFF NO.: 4002.20.00**

MARIA CELIS  
NEVILLE PETERSON LLP  
80 Broad Street—34th Floor  
New York, NY 10004

**RE:** Revocation of NY 818016; Liquid 1,2-Polybutadiene Rubber (NISSO PB-B1000)

DEAR MS. CELIS:

This letter is in reply to your letter of June 13, 2003, on behalf of Nisso America, Inc., in which you request that we reconsider NY 818016, dated March 19, 1996. We have reviewed the classification in NY 818016 and have determined that it is incorrect. This ruling sets forth the correct classification.

**FACTS:**

In NY 818016, Customs classified Liquid 1,2-Polybutadiene Rubber (NISSO PB-B1000), under subheading 3902.90.00, HTSUS and concluded that the product "did not meet the criteria for 'synthetic rubber' as set forth in Note 4(a) to Chapter 40, HTSUSA."

NISSO PB-B1000 is a good which is made from 100% 1,2 liquid polybutadiene polymer. It is used in the manufacture of tires and treads for automobiles, industrial products such as conveyor belts, hoses, seals, and gaskets, and other applications. Butadiene rubber is the second largest-volume synthetic rubber accounting for 23% of synthetic rubber consumption. You submit that polybutadiene rubber is known in commerce as synthetic rubber.

**ISSUE:**

What is the classification under the HTSUS of the NISSO PB-B1000?

**LAW AND ANALYSIS:**

The General Rules of Interpretation (GRI) of the Harmonized Tariff Schedule of the United States (HTUS) govern the proper classification of merchandise. GRI 1 provides that classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes. For an article to be classified in a particular heading, such heading must describe the article, and not be excluded therefrom by any legal note. Hence, if the merchandise is not classifiable in accordance with GRI 1 and if the headings and legal notes do not otherwise require, the merchandise may be classified in accordance with subsequent GRI.

The Explanatory Notes (ENs) are the official interpretation of the scope of the Harmonized Commodity Description and Coding System, which served as the basis for the HTSUS. The Court of International Trade has held that while the Explanatory Notes "do not constitute controlling legislative history, they nonetheless are intended to clarify the scope of the HTSUS..." See *Structural Industries, Inc. v. United States*, Slip Op. 02-141, p.5 n. 1

(Dec. 4, 2002), citing *Jewelpack Corp. v. United States*, 97 F. Supp. 2d 1192, 1196 n.6 (CIT 2000). Moreover, the Explanatory Notes are especially persuasive "when they specifically include or exclude an item from a tariff heading." See *H.I.M. / Fathom, Inc. v. United States*, 981 F. Supp. 610, 613 (1997).

The HTSUS headings under consideration are as follows:

3902 Polymers of propylene or of other olefins, in primary forms:

3902.90.00 Other

\* \* \*

4002 Synthetic rubber and factice derived from oils, in primary form or in plates, sheets, or strip; mixtures of any product of heading 4001 with any product of this heading, in primary forms or in plates, sheets or strip:

4002.20.00 Butadiene rubber (BR).

Note 2(h) to Chapter 39, HTSUS, provides:

This chapter does not cover:

(h) Synthetic rubber, as defined for purposes of chapter 40, or articles thereof.

Note 4 to Chapter 40, HTSUS, provides in pertinent part:

In note 1 to this chapter, and in heading 4002, the expression "synthetic rubber" applies to:

- (a) Unsaturated synthetic substances which can be irreversibly transformed by vulcanization with sulfur into non-thermoplastic substances, which at a temperature between 18 C and 29 C, will not break on being extended to three times their original length and will return, after being extended to twice their original length, within a period of 5 minutes, to a length not greater than 1- 1/2 times their original length. For the purposes of this test, substances necessary for the cross-linking such as vulcanizing activators or accelerators, may be added; the presence of substances as provided for by note 5(b)(ii) and (iii) is also permitted. However, the presence of any substances not necessary for the cross-linking, such as extenders, plasticizers and fillers, is not permitted.

In your letter of June 13, 2003, you submit that PB-B1000 is a synthetic rubber material which satisfies the requirements for classification as a synthetic rubber, as set out in Note 4(a) to Chapter 40, HTSUS. You claim therefore, that it is classified under subheading 4002.20.00, HTSUS, as a synthetic rubber.

You claim that the imported merchandise is classified under heading 4002, HTSUS, as a synthetic rubber in primary form. According to Note 3 of Chapter 40, the expression "primary forms" applies only to the following forms:

- (a) Liquids and pastes (including latex, whether or not pre-vulcanized, and other dispersions and solutions);
- (b) Blocks of irregular shape, lumps, bales, powders, granules, crumbs and similar bulk forms.

The PB-B1000 is in liquid form and thus is in primary form pursuant to Note 3 of Chapter 40.

You further submit that PB-B1000 is precluded from classification under heading 3902, HTSUS, as a primary form of propylene because (1) it satisfies the requirements of a synthetic rubber of heading 4002, and (2) it is more than a simple olefin of heading 3902. Note 2(h) to Chapter 39 states that Chapter 39 does not cover synthetic rubber as defined for purposes of Chapter 40.

You further aver that olefins classified under Heading 3902 do not have the elastic properties of the olefins, like butadiene rubber, under Chapter 40. You state that butadiene rubber is an olefin, but because it meets the elasticity tests of Note 4(a) to Chapter 40, it may not be classified as an olefin in primary form.

In support of your contention that the subject good has the elastic properties of a Chapter 40 synthetic rubber, and as such may not be classified as an olefin in primary form, you submitted two laboratory test results, one by Dainippon Jushi Kenkyusho, Co., Ltd. of Japan (DJK) and the other by Specialized Technology Resources (STR). The STR test uses the ASTM D 412-98a tests to measure elongation. In this regard, according to the standard's formula, as long as the percentage of elongation at break is above 200%, then the specimen has stretched to three times its original length without breaking.

Customs Laboratory in New York reviewed the ASTM D 412-98a test measurements taken by STR and analyzed the dumbbell samples with a recipe prepared by Nippon Soda Company of Tokyo, Japan. The subject merchandise was tested for compliance with Note 4(a) of Chapter 40, using the ASTM D 412-98a elongation test. Customs Laboratory Report NY-2003-1253, dated July 31, 2003, determined that a sample of the subject goods meets the definition of Note 4(a) to Chapter 40, HTSUS.

Therefore, pursuant to Note 2(h) to Chapter 39, HTSUS, the subject good is not included in Chapter 39. Accordingly, we find it is classified in subheading 4002.20.00, HTSUS, as: "Synthetic rubber and factice derived from oils, in primary form or in plates, sheets, or strip; mixtures of any product of heading 4001 with any product of this heading, in primary forms or in plates, sheets or strip: Butadiene rubber (BR)."

#### **HOLDING:**

The NISSO PB-B1000 is classified in subheading 4002.20.00, HTSUS, as: "Synthetic rubber and factice derived from oils, in primary form or in plates, sheets, or strip; mixtures of any product of heading 4001 with any product of this heading, in primary forms or in plates, sheets or strip: Butadiene rubber (BR)."

#### **EFFECT ON OTHER RULINGS:**

NY 818016 is revoked.

MYLES B. HARMON,  
*Director,*  
*Commercial Rulings Division.*

**19 CFR PART 177****PROPOSED REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF TERMINAL BLOCKS**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of proposed revocation of a tariff classification ruling letter and of treatment relating to the classification of certain terminal blocks

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke two ruling letters relating to the tariff classification, under the Harmonized Tariff Schedule of the United States, (HTSUS), of terminal blocks. Similarly, Customs proposes to revoke any treatment previously accorded by it to substantially identical merchandise. Comments are invited on the correctness of the intended actions.

**DATE:** Comments must be received on or before March 5, 2004.

**ADDRESS:** Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, Mint Annex, N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street, N.W., Washington, D.C., during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572-8768.

**FOR FURTHER INFORMATION CONTACT:** Robert Dinerstein, General Classification Branch, at (202) 572-8721.

**SUPPLEMENTARY INFORMATION:****BACKGROUND**

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obli-

gations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. § 1625(c)(1)), this notice advises interested parties that Customs intends to revoke two ruling letters relating to the tariff classification of terminal blocks. Although in this notice Customs is specifically referring to New York Ruling Letters ("NY") NY F86670, dated June 19, 2000, (Attachment A), and NY F86672 dated June 19, 2000, (Attachment B), this notice covers any rulings on this merchandise that may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the ones identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (*i.e.*, ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. § 1625 (c)(2)), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs' previous interpretation of the HTSUS. Any person involved with substantially identical merchandise should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY F86670, and NY F86672 Customs classified the terminal blocks in subheading 8356.90.80, HTSUS, which provides for "Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits . . . for a voltage not exceeding 1,000 V: Other apparatus: Other."

Based on additional information submitted by the importer, it is now Customs' position that the terminal blocks are classified in subheading 8536.90.40, HTSUS, which provides for "Electric apparatus

for switching for protecting electric circuits, or for making connection to or in electrical circuits . . . for voltage not exceeding 1,000 V: Other apparatus: Terminals, electrical splices and electrical couplings; wafer probers."

Pursuant to 19 U.S.C. § 1625(c)(1), Customs intends to revoke NY F86670, NY F86672, and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed Headquarters Rulings Letter (HQ) 966674 (Attachment C). Additionally, pursuant to 19 U.S.C. § 1625(c)(2), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions that are contrary to the determination set forth in this notice. Before taking this action, consideration will be given to any written comments timely received.

**DATED:** January 16, 2004

John Elkins for MYLES B. HARMON,  
*Director,*  
*Commercial Rulings Division.*

#### Attachments

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#### [ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.  
BUREAU OF CUSTOMS AND BORDER PROTECTION,  
NY F86670  
June 19, 2000  
CLA-2-85:RR:NC:1:112 F86670  
CATEGORY: Classification  
TARIFF NO.: 8536.90.8085

MR. MARK C. JOYE  
BAKER & HOSTETLER, LLP  
1000 Louisiana  
Houston, TX 77002-5009

RE: The tariff classification of a terminal block from Mexico

DEAR MR. JOYE:

In your letter dated April 24, 2000, on behalf of Krone, Inc., you requested a tariff classification ruling.

As indicated by the submitted sample, the terminal block, identified as a Krone 2/10/200 PRETERM DISC W/8 FEM internal wire type, consists of a series of 10-pair connecting blocks mounted in a metal frame. These blocks are, in turn, wired to a series of connectors on the back of the frame. In operation, the terminal block is used to provide a connection point for electrical cables that lead from telephone or computer equipment.

The applicable subheading for the Krone 2/10/200 PRETERM DISC W/8 FEM terminal block will be 8536.90.8085, Harmonized Tariff Schedule of

the United States (HTS), which provides for electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits . . . , for a voltage not exceeding 1,000 V: Other apparatus: Other. The rate of duty will be 2.7 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist David Curran at 212-637-7049.

ROBERT B. SWIERUPSKI,  
*Director,*  
*National Commodity Specialist Division.*

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[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.  
BUREAU OF CUSTOMS AND BORDER PROTECTION,

NY F86672  
June 19, 2000  
CLA-2-85:RR:NC:1:112 F86672  
CATEGORY: Classification  
TARIFF NO.: 8536.90.8085

MR. MARK C. JOYE  
BAKER & HOSTETLER, LLP  
1000 Louisiana  
Houston, TX 77002-5009

RE: The tariff classification of a terminal block from Mexico

DEAR MR. JOYE:

In your letter dated April 24, 2000, on behalf of Krone, Inc., you requested a tariff classification ruling.

As indicated by the submitted sample, the terminal block, identified as a Krone 25-Pair FT Block, is a connecting block that allows for the termination of telecommunication cable conductors. It consists of a plastic housing and base and acts as a passive housing to accept the cable.

The applicable subheading for the Krone 25-Pair FT Block will be 8536.90.8085, Harmonized Tariff Schedule of the United States (HTS), which provides for electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits . . . , for a voltage not exceeding 1,000 V: Other apparatus: Other. The rate of duty will be 2.7 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is im-

ported. If you have any questions regarding the ruling, contact National Import Specialist David Curran at 212-637-7049.

ROBERT B. SWIERUPSKI,  
*Director,  
National Commodity Specialist Division.*

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[ATTACHMENT C]

DEPARTMENT OF HOMELAND SECURITY.  
BUREAU OF CUSTOMS AND BORDER PROTECTION,  
**HQ 966674**  
**CLA-2 RR:CR:GC 966674 RSD**  
**CATEGORY:** Classification  
**Tariff No.** 8536.90.40

MARK C. JOYE, ESQ.  
JAIME A. JOINER, ESQ.  
BAKER & HOSTETLER, LLP  
1000 Louisiana, Suite 2000  
Houston, Texas 77002-5009

**RE:** Revocation of NY F86670 and NY F86672; Terminal Blocks for voice and data telecommunications

DEAR MR. JOYE AND MS. JOINER:

This is in response to your letter dated July 18, 2003, on behalf of Krone, Inc., and Krone Comunicaciones S.A. de V.V. ("Krone-Mexico") requesting reconsideration of New York Ruling Letters NY F86670 dated June 19, 2000, and NY F86672 dated June 19, 2000, concerning the tariff classification of two types of terminal blocks. The National Commodity Specialist Division forwarded your letter with the accompanying submissions to our office. We also received samples of the two terminal blocks under consideration.

**FACTS:**

The subject merchandise consists of two voice and data telecommunication products that are referred to as terminal blocks. The two products are 1) 200-Pair Collocation Blocks (product number 6637 1 180-49) (NY F86670) and 2) Feed Through Termination Blocks (product number 6631 2 135-05) (NY F86672).

The 200-Pair Collocation Blocks are pre-terminated assemblies (connecting blocks) with a special disconnect feature that are pre-terminated to an industry standard high pair count (50-pin) female (socket) cable connectors. This feature allows for the rapid connection and/or breakout of telecommunication equipment circuits inside a building. Normally, these blocks would be used to provide a connection point for cables coming from telecommunication or computer electronic equipment, so that the cables could be connected, in turn, to the user circuits in an equipment room. The plastic blocks are mounted in a metal bracket with "Velcro" cable straps that help relieve strain, and a ground lug to attach to the electrical building ground, if it is required by the electrical building codes where they are installed. The special disconnect feature allows a repairperson to test a circuit without having

to physically remove a cable from the block. This is achieved with the use of a 2-piece contact inside the blocks that can be opened by using special interface cords.

The Feed Through Termination Blocks ("FT") are connecting blocks that allow for the field termination of telecommunication cable conductors for voice or data circuits in an industry standard 25-pair group. The initials "FT" are used to designate the term for "feed through" which is the type of one-piece metal contact used in the block. The block would normally be used to provide a connection point for cables coming from a telephone or a computer jack at the user end, so that they could be connected, in turn, to a computer or a telephone circuit. It has a plastic housing and a base that allows it to mount mounting hardware, and it is color-coded in accordance with industry standards for using 4 pair (8 conductor) cables. This block does not actively use electricity, but only acts as a passive connection.

#### ISSUE:

Are the two terminal blocks classified as electrical apparatus for switching or protecting electric circuits . . . terminals in subheading 8536.90.40, HTSUS, or in subheading 8536.90.80, HTSUS, as electric apparatus for switching for protecting electrical circuits . . . other?

#### LAW AND ANALYSIS:

Classification under the Harmonized Tariff Schedule of the United States (HTSUS) is made in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied. GRI 3(a) provides in pertinent part that where goods are, *prima facie*, classifiable under two or more headings, the heading which provides the most specific description shall be preferred to headings providing a more general description. GRI 4 and GRI 5 are not applicable here. GRI 6 provides in pertinent part that the classification of goods in the subheadings of a heading shall be determined according to the above rules, on the understanding that only subheadings at the same level are comparable.

The Harmonized Commodity Description And Coding System Explanatory Notes (EN's) constitute the official interpretation of the Harmonized System. While not legally binding on the contracting parties, and therefore not dispositive, the EN's provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the system. Customs believes the EN's should always be consulted. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The HTSUS provisions under consideration are as follows:

8536	Electrical apparatus for switching or protecting electrical circuits, or for making connection to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs, sockets, lamp-holders, junction boxes), for a voltage not exceeding 1000 V:
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8536.90	Other apparatus:
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8536.90.40                      Terminals, electrical splices and electrical couplings;  
wafer probers.

\*   \*   \*   \*   \*   \*   \*   \*

8536.90.80                      Other.

\*   \*   \*   \*   \*   \*   \*   \*

Section (III) of EN 85.36 concerns "APPARATUS FOR MAKING CONNECTIONS TO OR IN ELECTRICAL CIRCUITS." The EN states that this apparatus is used to connect together the various parts of an electrical circuit: Section (III)(B) is entitled "Other connectors, terminals, terminal strips, etc." It provides that:

These include small squares of insulating material fitted with electrical connectors (dominoes), terminals which are metal parts intended for the reception of conductors, and small metal parts designed to be fitted on the end of electrical wiring to facilitate electrical connection (spade terminals, crocodile clips, etc.).

Terminal strips consist of strips of insulating material fitted with a number of metal terminal or connectors to which electrical wiring can be fixed. The heading also covers tag strips or panels; these consist of a number of metal tags set in insulating material so that electric wires can be soldered to them. Tag strips are used in radio or other electrical apparatus.

The two items under consideration, the 200-pair collocation blocks and the feed through termination blocks, are both types of terminal blocks. The issue that must be resolved is whether terminal blocks should be classified as electrical apparatus for switching or protecting electric circuits . . . terminals in subheading 8536.90.40, HTSUS, or in subheading 8536.90.80, HTSUS, as electric apparatus for switching for protecting electrical circuits . . . other.

A tariff term that is not defined in the HTSUS or in the ENs is construed in accordance with its common and commercial meanings, which are presumed to be the same. *Nippon Kogasku (USA) Inc. v. United States*, 69 CCPA 89, 673 F. 2d 380 (1982). Common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities and other reliable sources. *C.J. Tower & Sons v. United States*, 69 CCPA 128, 673 F. 2d 1268 (1982).

To supplement the description of the term terminal provided in the ENs, you have presented a definition from the Merriam-Webster Online Dictionary for the word "terminal" as:

A device attached to the end of a wire or cable or to an electrical apparatus for convenience in making connections.

The phrase "terminal blocks" is not defined in the HTSUS or ENs. You cite a web site, [www.cutler-hammer.eaton.com/unsecure/html/101basics/Module18/Output/WhatYouWillLearn.html](http://www.cutler-hammer.eaton.com/unsecure/html/101basics/Module18/Output/WhatYouWillLearn.html), which defines "terminal blocks" as:

Terminal blocks are modular, insulated blocks that secure two or more wires together and consist of an insulation body and a clamping device.

Their flexibility allows wiring to be centralized and makes it easier to maintain complex control circuits.

A terminal block secures two or more wires together to set up a circuit. Basically, there are just two parts: an insulating body and the current carrying parts.

The same web site continues:

Imagine the hassle involved with running wire from each device to the next, thus creating spiderweb of wiring. Instead, put a terminal block assembly inside a centralized control panel. You have now centralized and reduced the wiring so that a maintenance crew can quickly assess the status of the system and verify its performance . . .

When changes in the circuit need to be made, terminal blocks can be easily added or pulled off the rail without disrupting other wire terminations.

Along with reducing the complexity of control wiring, the plastic bodies of terminal blocks also prevent shorts and therefore provide greater safety to installers and maintenance crews.

Based on the information that was submitted, we find that terminal blocks are devices at the end of a wire or a cable used for connecting electrical circuits together. Accordingly, consistent with the description provided in EN 85.36, Section (III)(B), we conclude that terminal blocks can be considered as electrical terminals. We note that subheading 8536.90.40 HTSUS specifically includes electrical terminals. In contrast, the alternative tariff provision under consideration, subheading 8536.90.80, HTSUS, is a general basket provision for "Other." Thus subheading 8536.90.40, HTSUS provides a more specific description of the merchandise than subheading 8536.90.80, HTSUS.

In reaching this conclusion, we are following the holding in NY H82293 dated July 2, 2001. In NY H82293, Customs considered the classification of binding post blocks, items that were identified as jumpering devices used in feeder distribution and cross-connect application for building entrance terminals. The products consisted of a terminal block and pairs of electrical wiring. Customs determined that the applicable subheading for the binding post blocks was 8536.90.40, HTSUS. In essence, Customs held that the terminal blocks were classified as terminals in subheading 8536.90.40, HTSUS.

Accordingly, we conclude that the subject merchandise, the two types of terminal blocks, are classified in subheading 8536.90.40, HTSUS, as: "Electric apparatus for switching or protecting electric circuits, or for making connection to or in electrical circuits . . . : Other apparatus: Terminals, electrical splices and electrical couplings; wafer probers."

#### **HOLDING:**

Pursuant to GRI 6, the subject terminal boxes are classified in subheading 8536.90.40, HTSUS as "Electric apparatus for switching for protecting electric circuits, or for making connection to or in electrical circuits . . . for voltage not exceeding 1,000V: Other apparatus: Terminals, electrical splices and electrical couplings; wafer probers."

**EFFECT ON OTHER RULINGS:**

NY F866670 dated June 19, 2000 and NY F86672 dated June 19, 2000 are revoked.

MYLES B. HARMON,  
*Director,*  
*Commercial Rulings Division.*

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**19 CFR PART 177**

**REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF SEATS FOR FORK-LIFT TRUCKS**

**AGENCY:** U. S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of revocation of ruling letter and treatment relating to tariff classification of seats for fork-lift trucks.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling relating to the tariff classification of seats for fork-lift trucks, and revoking any treatment Customs has previously accorded to substantially identical transactions. Notice of the proposed revocation was published on December 10, 2003, in the Customs Bulletin.

**EFFECTIVE DATE:** This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after April 4, 2004.

**FOR FURTHER INFORMATION CONTACT:** James A. Seal, Commercial Rulings Division (202) 572-8779.

**SUPPLEMENTARY INFORMATION:**

**Background**

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are based on the premise that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law

imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's rights and responsibilities under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable Customs to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to Customs obligations, a notice was published on December 10, 2003, in the Customs Bulletin, Volume 37, Number 50, proposing to revoke HQ 954853, dated November 22, 1993, which classified seats for fork-lift trucks as parts suitable for use solely or principally with the machinery of heading 8427, in subheading 8431.20.00, Harmonized Tariff Schedule of the United States (HTSUS). No comments were received in response to this notice.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should have advised Customs during the comment period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment it previously accorded to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking HQ 954853 to reflect the proper classification of seats for fork-lift trucks in subheading 9401.80.40, HTSUS, as other seats, in accordance with the analysis in HQ 966854, which is set forth as the Attachment to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment it previously accorded to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

**DATED:** January 16, 2004

John Elkins for MYLES B. HARMON,  
*Director,*  
*Commercial Rulings Division.*

Attachment

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DEPARTMENT OF HOMELAND SECURITY,  
BUREAU OF CUSTOMS AND BORDER PROTECTION,  
HQ 966854  
January 16, 2004  
CLA-2 RR:CR:GC 966854 JAS  
CATEGORY: Classification  
TARIFF NO.: 9401.80.40

MS. SUZANNE O'HEARN  
CHINA DISTRIBUTORS, INC.  
19200 W. Dodge Road  
P.O. Box 540486  
Omaha, NE 68154

**RE:** HQ 954853 Revoked; Seats for Fork-Lift Trucks

MS. O'HEARN:

HQ 954853, issued to you on November 22, 1993, on behalf of China National Machinery Import/Export Corporation, Peking, China, in connection with Protest 3307-02-100032, concerned the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of seats for fork-lift trucks. HQ 954853 classified these seats in subheading 8431.20.00, HTSUS, as other parts suitable for use solely or principally with the machinery of headings 8425 to 8430; heading 8427 (i.e., fork-lift trucks).

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of HQ 954853 was published on December 10, 2003, in the Customs Bulletin, Volume 37, Number 50. No comments were received in response to that notice. As stated in the proposed notice of revocation, any liquidation or reliquidation of the entries in Protest 3307-02-100032 will be unaffected by this decision.

**FACTS:**

The merchandise in HQ 954853 is described only as seats designed to be attached to the floors of fork-lift trucks. Fork-lift trucks are motorized material handling vehicles typically with a cab and seat for the driver, designed to vertically lift and transport loads.

The seats were originally entered under the duty-free provision in subheading 8431.20.00, HTSUS, on the basis that they were designed solely for fork-lift trucks and distributed solely to dealers in these trucks. However, the entries were liquidated under a provision of heading 9401, HTSUS, as

other seats, on the basis that they were "seats," and were designed for placing on the floor [of fork-lift trucks], a requirement for goods of heading 9401.

The HTSUS provisions under consideration are as follows:

8431.20.00      Parts suitable for use solely or principally with the machinery of headings 8425 to 8430: Of machinery of heading 8427

\*   \*   \*   \*

9401.80.40      Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof: Other seats

#### ISSUE:

Whether seats that are parts of fork-lift trucks are provided for *eo nomine* in heading 9401.

#### LAW AND ANALYSIS:

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). GRI 1 states in part that for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

Section XVI, Note 2(a), HTSUS, states, in relevant part, that subject to certain exceptions that are not relevant here, parts of machines which are goods included in any of the headings of chapters 84 and 85 are in all cases to be classified in their respective headings. Note 2(b) states that other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading are to be classified with the machines of that kind. Additional U.S. Rule of Interpretation 1(c), HTSUS, states, in part, that a provision for "parts" or "parts and accessories" shall not prevail over a specific provision for such part or accessory.

Heading 9401 covers all seats, including those for vehicles, provided they comply with the conditions prescribed in Chapter 94, Note 2, HTSUS. Note 2 states, in part, that articles referred to in heading 9401 are to be classified there only if designed for placing on the floor or ground. Seats for fork-lift trucks meet the terms of this note.

By its terms, Additional U.S. Rule 1(c), HTSUS, applies in the absence of special language or context which otherwise requires. Section XVI, Note 2 is such special language or context, but only where the competing provisions at issue are within Section XVI. See *Nidec Corp. v. United States*, 861 F. Supp. 136, *aff'd*, 68 F. 3d 1333 (Fed Cir. 1995). However, in this case, because one of the competing provisions, heading 9401, is outside Section XVI, Note 2 to that section does not provide special language or context which supercedes Additional U.S. Rule of Interpretation 1(c), HTSUS. See HQ 561353, dated September 19, 2002.

Notwithstanding that seats for fork-lift trucks may otherwise qualify as parts of heading 8431, an unlimited *eo nomine* provision describes a good by name, and ordinarily covers all forms of the named article. With the exception of seats of heading 9402, heading 9401 covers all seats, including those for vehicles provided, as noted in Chapter 94, Note 2, they are designed for placing on the floor or ground. Heading 9401 is a specific provision for purposes of Additional U.S. Rule of Interpretation 1(c), HTSUS.

**HOLDING:**

Under the authority of Additional U.S. Rule of Interpretation 1(c), HTSUS, seats for fork-lift trucks are provided for in heading 9401. They are classifiable in subheading 9401.80.40, HTSUS.

**EFFECT ON OTHER RULINGS:**

HQ 954853, dated November 22, 1993, is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

John Elkins for MYLES B. HARMON,  
*Director,*  
*Commercial Rulings Division.*

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**19 CFR PART 177****REVOCATION OF RULING LETTER AND TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF FLUSHED PIGMENT COLOR PREPARATION**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of revocation of a ruling letter and treatment relating to the tariff classification of a flushed pigment color preparation.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling pertaining to the tariff classification of a flushed pigment preparation under the Harmonized Tariff Schedule of the United States ("HTSUS"). Similarly, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. Notice of the proposed revocation was published on September 24, 2003, in the CUSTOMS BULLETIN. Four comments supporting the proposed action were received in response to this notice, and two comments opposing the proposed action were received.

**EFFECTIVE DATE:** This revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after April 4, 2004.

**FOR FURTHER INFORMATION CONTACT:** Deborah Stern, General Classification Branch (202) 572-8785.

## SUPPLEMENTARY INFORMATION:

## BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are **informed compliance** and **shared responsibility**. These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), notice was published on September 24, 2003 in the CUSTOMS BULLETIN, Volume 37, Number 39, proposing to revoke NY F83432, dated March 27, 2000, which classified a flushed pigment named "Blue Flush" in subheading 3215.19.00, Harmonized Tariff Schedule of the United States (HTSUS), as a printing ink. Six comments were received in response to the proposed action—four in favor and two against the proposed action.

As stated in the proposed notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or to the importer's or Customs' previous interpretation of the HTSUS. Any person involved in substantially

identical transactions should have advised Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice.

In NY F83432, dated March 27, 2000, Customs classified a flushed pigment color preparation called "Blue Flush" as a printing ink of heading 3215, HTSUS. Based on industry resources and comments from industry representatives, it is clear that a "flush" (flushed pigment) is an ingredient used to manufacture heat-set and sheet-fed printing inks, as well as several other applications, and is sold to ink manufacturers for such purposes. For a flush to be made into a printing ink, it is further processed with additional ingredients under conditions specific to attain the desired functional properties. As such, a flush is an ingredient in the manufacture of printing ink but is not itself printing ink.

Heading 3204, HTSUS, the provision for synthetic organic coloring material and preparations based thereon, covers both dyes and pigments as well as preparations based on dyes and pigments. Heading 3215, on the other hand, covers printing inks, which may be in liquid or paste form, containing additives for specific functional properties, as per the description in Harmonized Commodity Description and Coding System Explanatory Notes (ENs) to heading 3215, HTSUS. The heading also includes concentrated and solid inks requiring only "simple dilution or dispersion." Reading heading 3204, HTSUS, *in pari materia* with heading 3215, HTSUS, it logically follows that the scope of heading 3204, HTSUS, covers color preparations that are not finished inks, concentrated inks or solid inks.

"Blue Flush" is a flush product is used in the manufacture of heat-set and sheet-fed printing ink. That is, it is a preparation based on a pigment, but is not yet printing ink. Therefore, it is now Customs position that "Blue Flush" is classified in subheading 3204.17.90, HTSUS, which provides for "Synthetic organic coloring matter, whether or not chemically defined; preparations as specified in note 3 to this chapter based on synthetic organic coloring matter; synthetic organic products of a kind used as fluorescent brightening agents or as luminophores, whether or not chemically defined: Synthetic organic coloring matter and preparations based thereon as specified in note 3 to this chapter: Pigments and preparations based thereon: Other: Other."

Pursuant to 19 U.S.C. 1625(c)(1), Customs is revoking NY F83432, and any other ruling not specifically identified, to reflect the proper classification of the subject merchandise or substantially similar merchandise, pursuant to the analysis set forth in HQ 966462, which is attached to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously ac-

corded by Customs to substantially identical merchandise. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: January 23, 2004

MYLES B. HARMON,  
*Director,*  
*Commercial Rulings Division.*

Attachments

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DEPARTMENT OF HOMELAND SECURITY.  
BUREAU OF CUSTOMS AND BORDER PROTECTION,  
**HQ 966462**  
January 23, 2004  
**CLA-2 RR: CR: GC 966462 DBS**  
**CATEGORY:** Classification  
**TARIFF NO.:** 3204.17.90

MR. JOHN PELLIGRINI  
MCGUIRE WOODS, LLP  
Park Avenue Tower  
65 East 55th Street  
New York, NY 10022-3219

**RE:** Revocation of NY F83432; Flushed pigment color preparations; "Blue Flush"

DEAR MR. PELLIGRINI:

On March 27, 2000, the Director, U.S. Customs and Border Protection National Commodity Specialist Division, New York, issued to you on behalf of your client, Micro Inks, Inc. ("Micro Inks"), New York Ruling Letter (NY) F83432, classifying "Blue Flush" in subheading 3215.19.00, Harmonized Tariff Schedule of the United States (HTSUS), as a printing ink. In light of NY I86471, dated February 14, 2003, which classified substantially similar products in the provision for preparations based on pigments, subheading 3204.17.90, HTSUS, we have reviewed NY F83432 for correctness. Consideration was given to the supplemental information and arguments provided in your letters of May 1, June 19, June 24, and July 14, 2003, as well as telephonic discussions with this office and the comments submitted by you in response to the proposed notice of revocation. We have found NY F83432 to be incorrect. This ruling sets forth the correct classification.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of the above identified ruling was published on September 24, 2003, in the CUSTOMS BULLETIN, Volume 37, Number 39. Six comments were received in response to the notice. Four were in favor of the proposed action. Two were opposed to it.

**FACTS:**

NY F83432 stated that the product consists of six components: pigment blue 15:3, resin, gellant, antioxidant, vegetable oil and ink oil. In your ruling request of March 7, 2000, to the National Commodity Specialist Division, you state that "Blue Flush" is a "concentrated ink in liquid form . . . used in engineered printing ink formulations." No sample was provided for analysis by the Customs laboratory. You have since stated that the product does not fall within the meaning of concentrated printing inks for purposes of heading 3215, HTSUS.

Additional information submitted to this office indicates that the instant flush is used in heat-set and sheet-fed printing applications. You state that the product is technically useable in its condition as imported as a printing ink but that it is not actually used as a printing ink because it is not press-ready. You maintain that "Blue Flush" should be classified as a printing ink because it is considered ink in the industry. However, industry sources indicate that flushes are the color ingredient in ink, the most common form in which organic pigments consumed in ink. They are generally used in the manufacture of heat-set inks, sheet-fed inks and newsprint ink. See *SRI International's Chemical Economics Handbook* (2001); *The Printing Ink Manual* (Fifth ed., 1993) (hereinafter "*Ink Manual*"). The Department of Paper Engineering, Chemical Engineering and Imaging at Western Michigan University provides in its website that flushes are:

. . . prepared as dyes in aqueous solutions, converted to pigments, precipitated, filtered and washed. The filter cake is mixed with a viscous varnish in a large dough mixer, a process known as flushing. The varnish eventually replaces the water adsorbed on the particles. Some water separates and is poured off. The remainder is removed by heating under vacuum. The flushed pigment is sold to the ink manufacturer. . .

<http://www.wmich.edu/ppse/inks/> visited on Aug. 18, 2003. See also *Ink Manual*, 709 and 814; National Association of Printing Ink Manufacturer's (NAPIM) *Printing Ink Handbook*, 100 (Fifth ed.); *What is an Ink?*, Technical Library, Sun Chemical Latin America (hereinafter "Sun Chem."), [http://www.tintas.com/tech\\_info/what\\_is\\_ink.html](http://www.tintas.com/tech_info/what_is_ink.html); *How is Ink Manufactured?*, Sun Chem., [http://www.tintas.com/tech\\_info/manufactured.html](http://www.tintas.com/tech_info/manufactured.html), both visited on Dec. 12, 2003.

Once sold to a manufacturer, there are several methods to convert a flush into ink. Commonly, the flush is further processed by adding additional oil, varnish, extender, additives and the like, which are mixed under specific conditions to attain desired functional properties. The ink mixture is then tested for specific physical requirements and put through a series of filtration steps before it becomes finished ink. See *How is Ink Manufactured?*, Sun Chem., *supra*.

Additionally, testimony given by expert witnesses and officers of Micro Inks and its parent company, Hindustan Inks and Resins, Ltd., before the U.S. International Trade Commission during a preliminary investigation into a claim by competitors for the imposition of countervailing and anti-dumping duties continually refers to "flush" and "ink" as distinct products. For example, it is stated that Micro Inks formulates its own inks, and that only a very small percentage of the flushes it imports are sold in the merchant market, as the remainder is used by Micro Inks in formulating its inks. The President and CEO of Micro Inks also describes certain Micro Ink

flushes as having a lower percentage by weight of pigment than its competitors' flushes, whose pigment percentages are similar to that of the "Blue Flush" (provided to Customs as part of the March 7, 2000 ruling request). See Transcript, Preliminary Investigation, *In the Matter of Certain Colored Synthetic Organic Oleoresinous Pigment Dispersions from India*, United States International Trade Commission ("USITC"), June 27, 2003, transcribed by Heritage Reporting Corporation, Official Reporters.

#### ISSUE:

Whether "Blue Flush" is classified in heading 3204, HTSUS, as a preparation based on pigments or in heading 3215, HTSUS, as a printing ink.

#### LAW AND ANALYSIS:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation (GRIs). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes (ENs) may be utilized. ENs, though not dispositive or legally binding, provide commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. Customs believes the ENs should always be consulted. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS provisions under consideration are as follows:

**3204** Synthetic organic coloring matter, whether or not chemically defined; preparations as specified in note 3 to this chapter based on synthetic organic coloring matter; synthetic organic products of a kind used as fluorescent brightening agents or as luminophores, whether or not chemically defined:

Synthetic organic coloring matter and preparations based thereon as specified in note 3 to this chapter:

3204.17                      Pigments and preparations based thereon:

Other:

3204.17.90                Other

\*   \*   \*

**3215** Printing ink, writing or drawing ink and other inks, whether or not concentrated or solid:

Printing ink:

3215.19.00                Other

\*   \*   \*

You contend that Blue Flush is properly classified in heading 3215, HTSUS. Note 3 to Chapter 32, HTSUS, provides, in pertinent part, that

"[h]eadin[g] 3204 . . . appl[ies] also to preparations based on coloring matter . . . of a kind . . . used as ingredients in the manufacture of coloring preparations. The headings do not apply, however . . . to other preparations of heading 3207, 3208, 3209, 3210, 3212, 3213 or 3215." EN 32.04(I)(E) states that the heading includes "[o]ther preparations based on synthetic organic colouring matter of a kind used for colouring any material or used as ingredients in the manufacture of colouring preparations. However, the preparations referred to in the last sentence of Note 3 to this Chapter are **excluded**."

Since preparations of heading 3215, HTSUS, are excluded from classification in heading 3204, HTSUS, we will first address heading 3215, HTSUS. There are no relevant section or chapter notes for printing ink of heading 3215, HTSUS. EN 32.15 describes printing ink as follows:

(A) **Printing inks (or colours)** are pastes of varying consistency, obtained by mixing a finely divided black or coloured pigment with a vehicle. The pigment is usually carbon black for black inks and may be organic or inorganic for coloured inks. The vehicle consists of either natural resins or synthetic polymers, dispersed in oils or dissolved in solvents, and contains a small quantity of additives to impart desired functional properties.

...

These products are generally in the form of liquids or pastes, but they are also included in this heading when concentrated or solid (i.e., powders, tablets, sticks, etc.) to be used as inks after simple dilution or dispersion.

Additionally, the Court of International Trade stated that inks contain colorants, binders and solvents. See *BASF Wyandotte Corp. v. United States*, 11 C.I.T. 652, 656 F. Supp. 1477, 1480 (1987), *aff'd* 855 F.2d 852 (CAFC 1988) (hereinafter *BASF*), citing *Corporation Sublistatica, SA v. United States*, 1 C.I.T. 120, 511 F. Supp. 805 (1981) (hereinafter *Sublistatica*). In *Sublistatica*, decided under the HTSUS predecessor, the Tariff Schedules of the United States (TSUS), the court addressed the classification of an ink product in powder form that was used in gravure printing. The court described that, "after the importation . . . of the powder . . . ethanol is added thereto causing the powder to liquefy. This substance is thereupon used [in a printing press]. . . ." *Sublistatica*, 1 CIT at 122. That is, the powder required simple dilution by ethanol to be a finished ink. Thus, the court found it was more advanced than a dye. However, the court concluded that finished inks required solvent, and therefore held the product was not classifiable as finished ink. See *id.* at 124. It also could not be classified as unfinished ink in the ink provision because there was a provision for ink powder in the TSUS. General Interpretative Rule 10(h) required that it be classified as ink powder. See *id.*

The *BASF* decision also involved inks versus dyes. In *BASF*, the products at issue, called Baxifans, were used in the textile industry for print transfer paper that is later used to color textiles by a heat transfer process. The court was persuaded by expert testimony that the products at issue contained sufficient amounts of the necessary components specific to this type of product other than requisite water to make it press-ready. See 11 C.I.T. at 655-56. Testimony indicated that for ordinary printing purposes, water need only be added by the "simple process of stirring or shaking." *Id.* at 1481. As in

*Sublistatica*, evidence supported that the product was more advanced than a dispersed dye. Thus, relying on *Sublistatica*, the *BASF* court held that Baxifans could not be classified as dyes. The court concluded that while the product "did not easily fit into ordinary notions of either dyes or inks, the testimony clearly establishes that [it] fit the relevant industry definition and performed as ink." 11 C.I.T. at 656.

While prior TSUS cases may be instructive in interpreting identical language in the HTSUS, they are not dispositive. H.R. Conf. Rep. No. 100-576, at 549-50 (1988), reprinted in 1988 U.S.C.C.A.N. 1547, 1582-83. As explained in the House Conference Report accompanying the Omnibus Trade and Competitiveness Act of 1988, which enacted the HTSUS:

In light of the significant number and nature of changes in nomenclature from the TSUS to the HTSUS, decisions by the Customs Service and the courts interpreting the nomenclature under the TSUS are not to be deemed dispositive in interpreting the HTSUS. Nevertheless, on a case-by-case basis prior decisions should be considered instructive in interpreting the HTSUS, particularly where the nomenclature previously interpreted in those decisions remains unchanged and no dissimilar interpretation is required by the text of the HTSUS.

The TSUS provisions at issue in *Sublistatica* and *BASF* are not identical to those in the HTSUS. For example, ink powder is now subsumed into heading 3215, HTSUS. In addition, the court concluded that the products in both cases were not classifiable in the dye provision because they were more advanced than disperse dyes, but heading 3204, HTSUS, clearly covers products more advanced than disperse dyes, as it specifically provides for preparations based on disperse dyes. Moreover, the court decisions relied heavily on facts adduced at trial. As such, these decisions are instructive, but not dispositive. While these cases provide guidance regarding the main components of ink, the mere presence of some colorant, binder and solvent is not sufficient to demonstrate that a preparation is a printing ink. It is also clear from EN 32.15 and from industry sources that inks do not contain only these three ingredients. Therefore, your reliance on the *Sublistatica* and *BASF* decisions for the proposition that products lacking solvent are classified in heading 3215, HTSUS, is misplaced.

Further, while the CIT has maintained that goods of heading 3215, HTSUS, contain certain ingredients, it has also held that goods classified in heading 3204, HTSUS, may contain several ingredients in addition to dispersed dyes or pigments. In *Ciba-Geigy Corporation v. United States*, 178 F. Supp. 2d 1336 (CIT 2001), the court supported a broad interpretation of the HTSUS Chemical Appendix to include preparations based on coloring matter, thus upholding Customs classification of Irgalite® preparations in heading 3204, HTSUS. We also note that although the terms "colorant," "binder" and "solvent" may be ambiguous. Colorant, for example, usually refers to the portion of finished ink that imparts the color, but it may sometimes refer complete inks or paints. See, e.g., National Paint and Coatings Association website, [www.paint.org/ind\\_info/terms.htm](http://www.paint.org/ind_info/terms.htm); Paintideas.com, <http://www.paintideas.com/glossary.asp?wordid=384>; and *The American Heritage Dictionary of the English Language* (Fourth Edition, 2000). Therefore, the scope of headings 3204 and 3215, HTSUS, cannot be interpreted solely on the basis of the court's decisions.

It is for these reasons we believe the two headings before us are complementary, and must be read in *pari materia*. The plain language of Note 3 to Chapter 32, HTSUS, provides that preparations of heading 3204, HTSUS, are "of a kind . . . used as ingredients in the manufacture of coloring preparations." The Note is specific and inclusive of all preparations that are ingredients. On the other hand, the description of printing ink found in EN 32.15 includes the additives which "impart desired functional properties," denoting that printing ink is complete product, as these properties are not present in, for example, a flush. See FACTS section, *supra*. Therefore, the scope of heading 3215, HTSUS, necessarily covers "coloring preparations" which are complete (press-ready) or those that "when concentrated or solid . . . [are] to be used as inks after simple dilution or dispersion." EN 32.15. Thus, heading 3204, HTSUS, covers preparations which are not as advanced as those of heading 3215, HTSUS.

Consistent with this interpretation, as well as with the relevant notes and case law, Customs has classified color preparations used as ingredients in various ink applications, many of which contain ingredients other than just the chemical color compound, in heading 3204, HTSUS. See HQ 953655, dated March 3, 1995; HQ 956158, dated July 27, 1995; HQ 956976, dated March 7, 1995; HQ 965614, dated September 30, 2002; HQ 965615, dated September 30, 2002; NY I86471, dated February 14, 2003; and HQ 966063, dated June 4, 2003. Specifically, in NY I86471 we classified products described as "flushed colors" in heading 3204, HTSUS. These products are based on synthetic organic coloring matter imported for resale to manufacturers of printing inks or to printers who manufacture their own inks. They are intended for use in heat-set, sheet-fed and letterpress printing applications. The Customs Laboratory analyzed samples of these flushes and determined a flush is a preparation based on synthetic organic coloring material.

Our position is also supported by the ink industry, whose representatives describe flushes as being used in the "manufacture" or "engineering" of ink. Comments received in favor of the proposed action from organizations that represent a large majority of the printing ink industry, such as NAPIM and the Color Pigments Manufacturer's Association (CPMA), as well as individual ink and color manufacturers, provided descriptions of printing ink and flushes that demonstrate that flushes are ingredients used in ink production, but are not printing ink. NAPIM stated that converting flush to ink requires the addition of chemical materials some of which may already be in the flush, but stressed that it is the ratio of the ingredients that creates the specific physical properties necessary for printing ink. These properties are not present in flushes. In addition to its comments, Sun Chemical's website explains that the conversion requires ingredients to be added at specific temperatures to create specific properties before enduring additional filtration and other processes. This distinction between flushes and ink is further supported by the published testimonies made before the USITC by the President and CEO of Micro Inks and a Hindustan Inks and Resins, Ltd. board member who both refer to them as separate products. See FACTS, *supra*.

Based on the plain language of Note 3 to Chapter 32, HTSUS, the guidance from the relevant case law and commercial reality, including input from members of the ink industry, Customs concludes that a flush is akin to the colorant portion of ink. As such, flushes are not printing inks, they are ingredients, and therefore fall within the scope of a preparation of heading

3204, HTSUS. As the description of "Blue Flush" is similar in composition to those flushes classified in NY I86471, and it is used in the same manner as other flushes in manufacture of heat-set and sheet-fed printing ink, it is likewise an ingredient and is not classified as a printing ink. As with other flushes, it is classified in heading 3204, HTSUS.

You contend, as an alternative to classification in heading 3215, HTSUS, according to GRI 1, that "Blue Flush" is an unfinished ink, classified in heading 3215, HTSUS, according to GRI 2(a). You provide lexicographic definitions of ink to support the contention that "Blue Flush" satisfies the common and commercial meaning of ink, notwithstanding that some in the trade do not refer to it as ink. You also claim that because heading 3204, HTSUS, is a principal use provision, classification in that heading is limited to use as "coloring matter," or that which imparts color. Since you state that "Blue Flush" does not impart color to another product, but is itself a color product, you claim it is outside the scope of heading 3204, HTSUS.

GRI 2(a) provides in part for an incomplete or unfinished good to be classified as the good itself if it imparts the essential character of the complete good. As discussed above, flushes are covered by heading 3204, HTSUS. A product that is fully described in one heading at GRI 1 is not classified in another heading as an unfinished good. The product at issue in *Sublistatica* was not classified as unfinished ink because a provision existed at that time that completely covered the product (i.e., ink powder; see 511 F. Supp. at 808-9), just as heading 3204, HTSUS covers the instant product. In fact, if Customs had before it today the product at issue in *Sublistatica*, we would still classify it according to GRI 1, not GRI 2(a), because ink powder now falls within the scope of heading 3215, HTSUS. See EN 32.15. As we stated in HQ 966063, "it would be counterintuitive to classify an ingredient used to make a preparation of 3215, HTSUS (specifically provided for in the legal note), as a preparation of heading 3215, HTSUS." Accordingly, GRI 2(a) does not apply.

Comments submitted in opposition to the proposed action asserted that Customs analysis in HQ 966063 is flawed because the ink jet preparations (classified therein) need not be limited to a specific ink jet application to be classified as printing ink. In HQ 966063 we went to great lengths to show that different ink-jet applications required substantially different types of ingredients. As stated above, ingredients fall to be classified outside of heading 3215, HTSUS. Since the colorants that were before us could be used in several ink-jet applications, we could not identify with certainty that the products were anything more than ingredients. We believe that the commentators misinterpreted the context of this statement to constitute a requirement of dedicated use. On the contrary, we simply must be able to identify with certainty a product is a printing ink and not merely an ingredient in printing ink.

For the foregoing reasons, we find NY F83432 to be in error. "Blue Flush" is described by Note 3 to Chapter 32, and is classified at GRI 1 in heading 3204, HTSUS.

We further note the procedures set forth in 19 U.S.C. § 516 and 19 C.F.R. § 175, regarding petitions by "domestic interested parties," are not at issue here. Customs awareness of a possible inconsistency in the rulings on flushed pigments was not raised in a petition by a domestic interested party. Customs received a request under 19 C.F.R. § 177.9(c) for information as to whether a previously issued ruling letter has been modified or revoked.

Based on our review of the rulings pursuant to that request, Customs determined that an action to revoke NY F83432 in accordance with 19 U.S.C. 1625(c) was appropriate.


**HOLDING:**

"Blue Flush" is classified in subheading 3204.17.90, HTSUS, which provides for, "Synthetic organic coloring matter, whether or not chemically defined; preparations as specified in note 3 to this chapter based on synthetic organic coloring matter; synthetic organic products of a kind used as fluorescent brightening agents or as luminophores, whether or not chemically defined: Synthetic organic coloring matter and preparations based thereon as specified in note 3 to this chapter: Pigments and preparations based thereon: Other: Other."

**EFFECT ON OTHER RULINGS:**

NY F83432, dated March 27, 2000, is hereby REVOKED. In accordance with 19 U.S.C 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

John Elkins for MYLES B. HARMON,  
*Director,*  
*Commercial Rulings Division.*



# United States Court of International Trade

One Federal Plaza  
New York, NY 10278

## *Chief Judge*

Jane A. Restani

## *Judges*

Gregory W. Carman  
Thomas J. Aquilino, Jr.  
Donald C. Pogue  
Evan J. Wallach

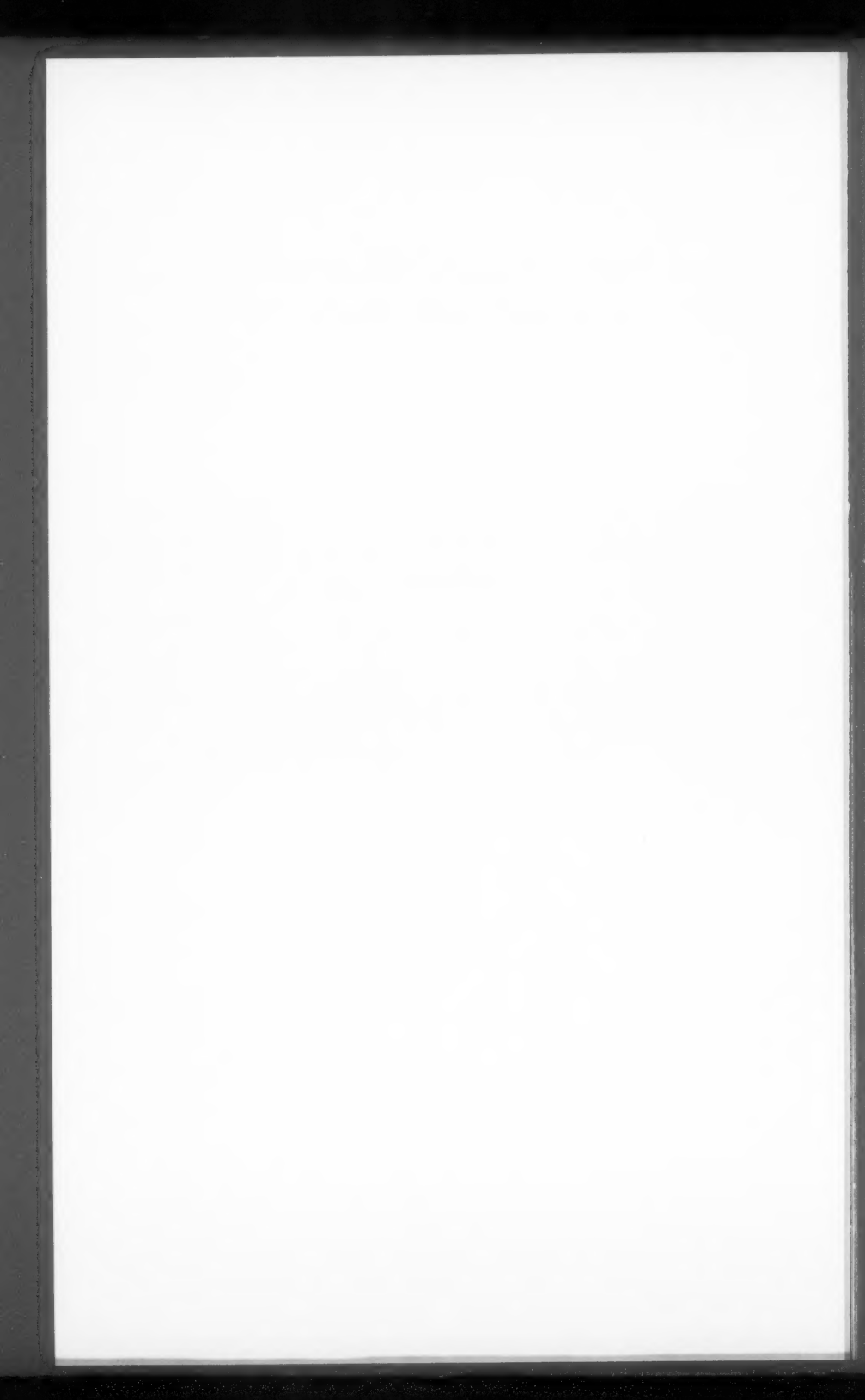
Judith M. Barzilay  
Delissa A. Ridgway  
Richard K. Eaton  
Timothy C. Stanceu

## *Senior Judges*

Nicholas Tsoucalas  
R. Kenton Musgrave  
Richard W. Goldberg

## *Clerk*

Leo M. Gordon



# Decisions of the United States Court of International Trade

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SLIP OP. 03-168

NIPPON STEEL CORP., KAWASAKI STEEL CORP., THYSSENKRUPP ACCIAI SPECIALI TERNI S.P.A. AND ACCIAI SPECIALI TERNI (USA), INC., PLAINTIFFS, V. UNITED STATES, DEFENDANT, AND ALLEGHENY LUDLUM CORP., AK STEEL CORP., BUTLER ARMCO INDEPENDENT UNION, ZANESVILLE ARMCO INDEPENDENT UNION, AND UNITED STEELWORKERS OF AMERICA, AFL-CIO/CLC, DEFENDANT-INTERVENORS.

CONSOL. COURT No. 01-00103  
PUBLIC VERSION

[United States International Trade Commission's sunset review of countervailing and antidumping duty orders on grain-oriented silicon electrical steel, as modified on remand, remanded a second time.]

Dated: December 17, 2003

*Gibson, Dunn & Crutcher, LLP (Joseph H. Price, Douglas R. Cox, Gracia M. Berg, Gregory C. Gerdes), for plaintiff Nippon Steel Corporation.*

*Arent Fox Kintner Plotkin & Kahn, PLLC (Robert H. Huey, Matthew J. Clark, Nancy A. Noonan, Steven F. Hill, Timothy D. Osterhaus), for plaintiff Kawasaki Steel Corporation.*

*Hogan & Hartson, LLP (Lewis E. Leibowitz, Steven J. Routh, David G. Leitch, T. Clark Weymouth, David P. Kassebaum), for plaintiffs ThyssenKrupp Acciai Speciali Terni S.p.A. and Acciai Speciali Terni (USA), Inc.*

*Lyn M. Schlitt, General Counsel, United States International Trade Commission; James M. Lyons, Deputy General Counsel, United States International Trade Commission (Gracemary Rizzo Roth-Roffy, Mark B. Rees), for defendant United States International Trade Commission.*

*Collier Shannon Scott, PLLC (Kathleen W. Cannon, Michael J. Coursey, Eric R. McClafferty, John M. Herrmann, Grace W. Kim, David A. Hartquist), for defendant-intervenors Allegheny Ludlum Corporation, AK Steel Corporation, Butler Armco Independent Union, Zanesville Armco Independent Union, and the United Steelworkers of America, AFL-CIO/CLC.*

### OPINION AND ORDER

*EATON, Judge:* This case is before the court following remand to the United States International Trade Commission ("ITC"). In *Nippon Steel Corp. v. United States*, 26 CIT \_\_\_, slip op. 02-153 (Dec. 24, 2002) ("*Nippon III*"),<sup>1</sup> this court remanded the ITC's sunset review determination in Grain-Oriented Silicon Electrical Steel From Italy and Japan, USITC Pub. 3396, Invs. Nos. 701-TA-355 and 731-TA-659-660 (Feb. 2001), List 1, Doc. 75 ("Final Determination"),<sup>2</sup> made pursuant to 19 U.S.C. §§ 1675(c), 1675a(a) (2000).<sup>3</sup> The court instructed the ITC to:

(1) determine, in accordance with the court's finding as to the meaning of "likely" within the context of . . . [19 U.S.C. §§] 1675(c) and 1675a(a) [i.e., that likely means probable], whether revocation of the Subject Orders would be likely to lead to continuation or recurrence of material injury, upon consideration of the likely volume, price effect, and impact of imports of the subject merchandise on the industry; and (2) demonstrate, in conformity with this opinion, (a) that it performed the requisite analysis by considering each of the four factors outlined in 19 U.S.C. § 1675a(a)(2)(A)-(D); and (b) that it considered whether, were the Subject Orders revoked, the likely volume of imports of the subject merchandise would be significant either in absolute terms or relative to production or consumption in the United States, pursuant to 19 U.S.C. § 1675a(a)(2).

<sup>1</sup> See also *Nippon Steel Corp. v. United States*, 25 CIT \_\_\_, slip op. 01-153 (Dec. 28, 2001) (holding plaintiffs had standing to challenge the recess appointment of Commissioner Dennis M. Devaney and granting discovery); *Nippon Steel Corp. v. United States*, 26 CIT \_\_\_, 239 F. Supp. 2d 1367 (2002) (holding appointment of Dennis M. Devaney as a commissioner of the ITC was valid).

<sup>2</sup> The staff report accompanying the Final Determination ("Staff Report") is in the public record at List 1, Doc. 75. The confidential version is in the record at List 2, Doc. 41.

<sup>3</sup> Grain-oriented silicon electrical steel ("GOES") is

a flat-rolled alloy steel product containing by weight at least 0.6 percent of silicon, not more than 0.08 percent of carbon, not more than 1.0 percent of aluminum, and no other element in an amount that would give the steel the characteristics of another alloy steel, of a thickness of no more than 0.56 millimeters, in coils of any width, or in straight lengths which are of a width measuring at least 10 times the thickness . . . [of the steel].

Grain-Oriented Elect. Steel From Italy and Japan, 65 Fed. Reg. 41,433, 41,433 (Dep't Commerce July 5, 2000) (final results of expedited sunset reviews of antidumping duty orders). "GOES is used to manufacture laminated cores for electrical transformers and other electrical devices." Staff Report at I-10. "Demand for GOES is derived from the demand for transformers, which, in turn, is derived from the demand for electricity." *Id.* at II-1. The countervailing and antidumping duty orders in these sunset reviews ("Subject Orders") were issued in 1994 and published in the Federal Register at 59 Fed. Reg. 29,414 (Dep't Commerce June 7, 1994) (countervailing duty order on GOES from Italy), 59 Fed. Reg. 29,984 (Dep't Commerce June 10, 1994) (antidumping duty order on GOES from Japan), 59 Fed. Reg. 41,431 (Dep't Commerce Aug. 12, 1994) (antidumping duty order on GOES from Italy).

*Nippon III*, 26 CIT at \_\_\_, slip op. 02-153 at 16. In light of its findings with respect to the ITC's application of the likely standard and the legal sufficiency of the ITC's analysis of likely volume, pursuant to 19 U.S.C. § 1675a(a)(2), the court did not address the parties' substantial evidence arguments, finding that to do so at that time would have been premature. *Id.* at 15.

In its remand determination, the ITC stated that it applied "likely" to mean "probable." See Grain-Oriented Silicon Electrical Steel From Italy and Japan, USITC Pub. 3585, Invs. Nos. 701-TA-355 and 731-TA-659-660 (Mar. 2003), List 1, Doc. 79R ("Remand Determination")<sup>4</sup> at 2 n.6 ("For purposes of the Commission's determinations on remand in these reviews, we apply the term 'likely' consistent with the Court's instruction and with other recent decisions of the Court of International Trade which address the meaning of the term 'likely' as it is to be applied in five-year reviews.") (citing *Usinor Industeel, S.A. v. United States*, 26 CIT \_\_\_, \_\_\_, slip op. 02-39 at 25 (Apr. 29, 2002); *Usinor v. United States*, 26 CIT \_\_\_, \_\_\_, slip op. 02-70 at 43-44 (July 19, 2002); *Usinor Industeel, S.A. v. United States*, 26 CIT \_\_\_, slip op. 02-75 (July 30, 2002); *Usinor Industeel, S.A. v. United States*, 26 CIT \_\_\_, slip op. 02-152 (Dec. 20, 2002)). With respect to its likely volume analysis, the ITC stated that it considered each of the statutory factors in 19 U.S.C. § 1675a(a)(2)(A)-(D), and found that "[b]ecause of the nature of the GOES industry and market, . . . all four factors were [not] dispositive in [its] analysis."<sup>5</sup> *Id.* at 3. The ITC concluded that "the likely volume of subject imports would be significant in terms of U.S. production and U.S. apparent consumption if the countervailing and antidumping duty orders were revoked." *Id.* at 10-11. In addition, the ITC adopted the views expressed in the Final Determination with respect to the domestic like product, domestic industry, conditions of competition, and cumulation determinations.<sup>6</sup> *Id.* at 2. By its Remand Determination, the ITC affirmed its original conclusion that revocation of the Subject Orders would be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *Id.* at 17.

<sup>4</sup> For the confidential Remand Determination, see Grain-Oriented Silicon Electrical Steel From Italy and Japan, USITC Pub. 3585, Invs. Nos. 701-TA-355 and 731-TA-659-660 (Mar. 2003), List 2, Doc. 142R ("Conf. Remand Determination").

<sup>5</sup> In particular, the ITC found that the "lack of inventories, absence of barriers to importation in other markets, and limited potential for product shifting, did not outweigh other factors which led [the Commissioners] to conclude that the likely volume of imports would be significant if the orders were revoked." Remand Determination at 3.

<sup>6</sup> While plaintiffs in this action argue that the ITC, in relying on its prior views as expressed in the Final Determination, failed to comply with the court's directive in *Nippon III* to apply "likely" to mean "probable," the court notes that they are actually challenging whether the ITC's findings, using the standard that likely means probable, are supported by substantial evidence.

Plaintiffs Nippon Steel Corporation ("Nippon"), Kawasaki Steel Corporation ("Kawasaki")<sup>7</sup> (collectively, the "Japanese producers"), and ThyssenKrupp Acciai Speciali Terni S.p.A.<sup>8</sup> ("AST" or the "Italian producer") and Acciai Speciali Terni (USA), Inc.<sup>9</sup> (collectively, "Plaintiffs") challenge, as unsupported by substantial evidence on the record, several of the ITC's determinations, including those relating to cumulation, likely volume, likely price effects, and likely impact on the domestic industry.<sup>10</sup> The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I). For the reasons set forth below, the court remands this matter to the ITC for further action in conformity with this opinion.

### STANDARD OF REVIEW

The court will hold unlawful "any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted). In conducting its review, the court's function is not to reweigh the evidence but rather to ascertain whether the ITC's determinations are supported by substantial evidence on the record. *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 936 (Fed. Cir. 1984). The possibility of drawing two inconsistent conclusions from the record evidence does not, in itself, prevent the ITC's determinations from being supported by substantial evidence. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted).

### DISCUSSION

#### I. CUMULATION

In a sunset review, before making its "likelihood of continuation or recurrence of material injury" determination, the ITC may, in its dis-

<sup>7</sup> Kawasaki is now known as JFE Steel Corporation. See Letter to Clerk of the Court from Arent Fox Kintner Plotkin & Kahn, PLLC of 4/23/03.

<sup>8</sup> Effective January 18, 2002, Acciai Speciali Terni S.p.A. changed its name to ThyssenKrupp Acciai Speciali Terni S.p.A. See Notice filed by Hogan & Hartson, LLP of 2/11/02.

<sup>9</sup> Acciai Speciali Terni (USA), Inc. [ ] Staff Report at IV-4.

<sup>10</sup> See Plaintiffs' Comments on the Remand Determination of the U.S. International Trade Commission ("Pls.' Comments"). Defendant-intervenor Allegheny Ludlum Corp., AK Steel Corp., Butler Armco Independent Union, Zanesville Armco Independent Union, and United Steelworkers of America, AFL-CIO/CLC submitted Defendant-Intervenor's Comments Addressing Remand Determination of U.S. International Trade Commission, and the ITC submitted Defendant's Comments on Plaintiffs' Objections to the International Trade Commission's March 14, 2003 Remand Determination ("Def.'s Comments").

cretion, cumulatively assess the volume and effect of imports of subject merchandise from different countries<sup>11</sup> "if such imports would be likely to compete with each other and with domestic like products in the United States market." 19 U.S.C. § 1675a(a)(7)<sup>12</sup>; see also *Usinor Industeel, S.A.*, 26 CIT at \_\_\_, slip op. 02-152 at 11 (quoting 19 U.S.C. § 1675a(a)(7)). Cumulation is prohibited where the ITC "determines that such imports are likely to have no discernible adverse impact on the domestic industry." 19 U.S.C. § 1675a(a)(7). That is, "[t]he Commission shall not cumulate imports from any country if those imports are likely to have no discernible adverse impact on the domestic industry." Statement of Administrative Action, accompanying H.R. REP. NO. 103-826(I), at 887, reprinted in 1994 U.S.C.C.A.N. 4040, 4212 ("SAA")<sup>13</sup> (emphasis added); see also *Usinor Industeel, S.A.*, 26 CIT at \_\_\_, slip op. 02-152 at 12 (noting "there is no statutory provision enumerating the factors to be considered in determining whether subject imports from a particular country are likely to have no discernible impact.").

In the Final Determination,<sup>14</sup> the ITC stated, (1) "that subject imports from each country would enter the U.S. market in sufficient quantities and at sufficiently low prices such that they would have a discernible adverse impact on the domestic industry," Final Determination at 9; (2) that "there likely would be a reasonable overlap of competition . . . between the subject imports themselves, if the orders are revoked," *id.* at 10, and (3) that "there likely would be a reasonable overlap of competition between the subject imports [from Japan and Italy] and the domestic like product, . . . if the orders are revoked," *id.*, and therefore exercised its discretion to cumulate the subject imports. Plaintiffs dispute the first and second of these findings.

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<sup>11</sup>The aim of the cumulation provision is to address the "hammering effect" that "competition from unfairly traded imports from several countries simultaneously often has . . . on the domestic industry." *Neenah Foundry Co. v. United States*, 25 CIT \_\_\_, \_\_\_, 155 F. Supp. 2d 766, 772 (2001) (quoting H.R. REP. NO. 100-40, part 1, 100th Cong., 1st Sess., at 130 (1987)). The cumulation provision enables the ITC to conduct a "more realistic" material injury analysis, "in terms of recognizing the actual effects of unfair import competition." H.R. REP. NO. 100-40, part 1, 100th Cong., 1st Sess., at 130 (1987).

<sup>12</sup>The statute also requires that the antidumping or countervailing duty sunset reviews be initiated on the same day. See 19 U.S.C. § 1675a(a)(7). It is undisputed that this requirement has been met.

<sup>13</sup>The SAA is "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

<sup>14</sup>On remand, the ITC found that "the application of the term 'likely' as meaning 'probable' [did] not change [its] reasoning or conclusions . . . [contained in its] prior views" with respect to the issues of no discernible adverse impact and reasonable overlap of competition. Remand Determination at 2. Thus, as to those issues, the court focuses on the ITC's findings in the Final Determination.

### A. No Discernible Adverse Impact

In determining whether imports are likely to have no discernible adverse impact on the domestic industry, the ITC, as this Court has explained, engages in a dual inquiry:

[A]n affirmative finding of discernible impact is only part of the answer to the question of whether cumulation is precluded. In other words, the first question is whether the imports [from a particular country] are likely to have any [discernible] impact. If not, the ITC is precluded from cumulating. If yes, then the question remains whether that impact is also adverse.

*Neenah Foundry Co.*, 25 CIT at \_\_\_, 155 F. Supp. 2d at 775; *Chefline Corp. v. United States*, 25 CIT \_\_\_, \_\_\_, 170 F. Supp. 2d 1320, 1331 (2001) (quoting *Neenah Foundry*, 25 CIT at \_\_\_, 155 F. Supp. 2d at 775). The likely "discernible impact" determination is not limited to an analysis of volume, as evidenced by Congress's use of the word "impact" in the statute, which, "in the context of U.S. unfair trade law, by any definition, encompasses more than volume of imports." *Neenah Foundry Co.*, 25 CIT at \_\_\_, 155 F. Supp. 2d at 776. That the discernible impact also must be adverse requires that the imports cause some harm. For cumulation to be warranted, however, this harm need not rise to the level of "material injury."<sup>15</sup>

The ITC stated its discernible adverse impact determination as follows:

Because of the conditions of competition and the current condition of the domestic industry,<sup>16</sup> exports from Italy and Japan<sup>17</sup>

<sup>15</sup> As the court recently stated in *Usinor Industeel, S.A. v. United States*, 27 CIT \_\_\_, slip op. 03-118 (Sept. 8, 2003):

An adverse impact, or harm, can be discernible but not rise to a level sufficient to cause material injury. The different standards reflect the nature of the cumulation analysis. Certain imports are to be cumulated to assess causation of material injury, but the no "discernible impact" provision provides a safe harbor of sorts for certain imports viewed in isolation.

*Id.* at 7 (footnote omitted) (citing *Neenah Foundry Co.*, 26 CIT at \_\_\_, 155 F. Supp. 2d at 772-73).

<sup>16</sup> The ITC found the following with respect to the conditions of competition and condition of the domestic industry: (1) increasing demand for electricity in the United States, (2) decreasing excess electrical capacity worldwide, (3) increased use of lower, less efficient and less costly grades of GOES due to uncertainties resulting from the deregulation of the electrical power industry, (4) increasing competition between U.S. transformer producers and laminators/stampers and transformer imports from Canada and Mexico (many of which are made with Japanese and Italian GOES), (5) the need of manufacturers to maintain high capacity utilization rates to remain profitable due to the capital-intensive nature of GOES production, and (6) apparent improvement in the state of the domestic industry since the imposition of the Subject Orders. See Final Determination at 14-16.

<sup>17</sup> Apparently because its findings for Japan and Italy were similar with respect to discernible adverse impact, the ITC has chosen to express its findings for each country concur-

likely would have a discernible adverse impact on the domestic industry.

Subject imports from Italy and Japan have remained in the U.S. market in the years since the orders were imposed, albeit at substantially reduced levels. The continuing presence of these subject imports in the domestic market indicates that subject foreign producers continue to have contacts and channels of distribution necessary to compete in the U.S. market.

Industry capacity in Japan has remained large (greater than annual U.S. consumption) and industry capacity in Italy has grown since the original investigations. The GOES industries in both Italy and Japan devote considerable resources to export markets. In 1999, the share of total shipments of GOES exported from Italy was [ ] percent while the share of total shipments of GOES exported from Japan was [ ] percent. For the reasons discussed below,<sup>18</sup> we believe that subject imports from each country would enter the U.S. market *in sufficient quantities and at sufficiently low prices* such that they would have a discernible adverse impact on the domestic industry.

Final Determination at 9 (footnotes omitted) (emphasis added). Plaintiffs take issue with the ITC's findings as to the Japanese and Italian imports' "continuing presence" in the U.S. market, the size of GOES industry capacity in Japan and Italy, and the Japanese and Italian GOES industries' export orientation. They argue that "[none] of these findings . . . is sufficient to show that GOES imports from Italy and Japan *likely* would have any discernible impact—let alone a discernible *adverse* impact—upon the domestic industry." Pls.'

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rently. It is important to note, however, that the statute and the SAA require that a discernible adverse impact finding be made for each country individually, and that, in fact, the ITC stated its conclusion in conformance with these strictures, i.e., "that subject imports from each country would enter the U.S. market in sufficient quantities and at sufficiently low prices such that they would have a discernible adverse impact on the domestic industry." Final Determination at 9; see SAA at 887 ("The Commission shall not cumulate imports from any country if those imports are likely to have no discernible adverse impact on the domestic industry." (emphasis added)).

<sup>18</sup>The court examines the ITC's reasoning as it is expressed in the section entitled "Likelihood of No Discernible Adverse Impact." See Final Determination at 9. As noted *supra*, the ITC specifically referenced the conditions of competition in, and current state of, the domestic industry "[b]ecause of" which the ITC concluded that Japanese and Italian imports likely would have a discernible adverse impact. That much is clear. By citing the "reasons discussed below," *id.*, it is possible that the ITC meant that it generally took into consideration its subsequent determinations with respect to reasonable overlap of competition, likely volume, price effects, and impact. Because of the importance of these findings, however, on remand the ITC shall state with specificity which of these matters it took into consideration including specific citation to any documents taken into consideration, and explain clearly its reasons for relying on such document and its analysis in arriving at its findings.

Mem. Supp. Mot. J. Agency R. ("Pls.' Mem.") at 15 (emphasis in original).

First, Plaintiffs argue that "record evidence does not, in fact, show that the subject producers have had such a 'continuing presence' [in the U.S. market] that they 'continue to have contacts and channels of distribution necessary to compete in the U.S. market.'" Pls.' Mem. at 15 (quoting Final Determination at 9). With respect to Japan, Plaintiffs argue that the record shows that Nippon and Kawasaki exported little or no GOES to the United States between 1997 and 2000 (the "Review Period").<sup>19</sup> *Id.* With respect to Italy, Plaintiffs contend that the record shows that "Italian producer AST had very few sales in the U.S. over the period of investigation," i.e., "less than 85 tons of Italian imports over a 45-month period, with no sales during the first nine months of 2000." *Id.* (citing Staff Report, tbl. I-4). Second, Plaintiffs argue that the ITC's findings that Japanese GOES industry capacity is "large" and that Italian GOES industry capacity "has grown," without more, do not support the finding that Japanese and Italian subject imports would likely cause a discernible adverse impact. *Id.* at 16. According to Plaintiffs, the evidence shows that the Japanese and Italian producers "are operating at or near full capacity and will be for the foreseeable future. . . ." *Id.* at 17. Third, Plaintiffs contend that the ITC's finding that the Japanese and Italian GOES industries are export-oriented "is not predictive of what the size, make-up or impact of their U.S. exports *likely* would be if the orders were revoked." *Id.* (emphasis in original).

The ITC responds to each of these arguments in turn. First, the ITC contends that, with respect to "continuing presence," "[i]t is not the amount of sales but the continuation of sales that is of relevance." Def.'s Mem. Opp'n Pls.' Mot. Summ. J. Agency R. ("Def.'s Mem.") at 18. The ITC explains:

The continued sales indicate subject producers did not altogether abandon the U.S. market but continued to maintain ties with U.S. customers after the orders were imposed. As such, subject producers had maintained the commercial links which would allow them to increase imports to the U.S. market with relative ease if the orders were lifted.

*Id.* at 18-19. Second, the ITC contends that the size of GOES industry capacity in Japan and Italy must be viewed against the backdrop

<sup>19</sup>Specifically, Plaintiffs argue, [[

]] Pls.' Mem. at 15 (emphasis in original) (citing [[ Foreign Producer Questionnaire Resp., List 2, Doc. 59 at 8). Furthermore, [[ "exported only [[ of high-permeability GOES over the forty-five months reviewed by the Commission, and made the vast majority of those sales [[ during the [[ ]," and most recent data show that [[

]] *Id.* at 15-16 (citing [[ Foreign Producer Questionnaire Resp., List 2, Doc. 60 at 8).

of the prevailing conditions of competition in the industry. The ITC highlights that "GOES steel production is relatively capital intensive" and requires manufacturers to "sustain relatively high capacity utilization rates to stay profitable." *Id.* at 19. Therefore, the ITC posits, "increases of the volume of subject imports from each country would be likely." *Id.* Third, the ITC argues that the Japanese and Italian GOES industries' export orientation must also be evaluated in the context of the conditions of competition. The ITC claims that where an industry such as the GOES industry is reliant on exports to maintain its capacity utilization rates, there exists "economic incentive for subject producers to increase levels of subject imports to the higher-priced U.S. market<sup>20</sup> upon revocation." *Id.* at 19-20. The ITC argues that its finding "that subject imports from Japan and Italy would likely increase and be sold at price depressing levels resulting in a discernible adverse impact . . . are both reasonable and supported by substantial evidence." *Id.* at 21.

The court does not agree that substantial evidence supports the ITC's finding that GOES imports from Japan and GOES imports from Italy would likely have a discernible adverse impact on the domestic industry upon revocation of the Subject Orders. The court shall examine the record evidence with respect to Japan and Italy separately, to determine whether it supports the ITC's determinations—i.e., whether "a reasonable mind might accept [the evidence] as adequate to support [the ITC's] conclusion[s]." <sup>21</sup> *Consol. Edison Co.*, 305 U.S. at 229. In conducting its review, however, the court "cannot evaluate the substantiality of evidence supporting an ITC determination 'merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.'" *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951)). Rather, to determine the substantiality of the evidence, the court must also take into account "whatever in the record fairly detracts from its weight." *Universal Camera*, 340 U.S. at 488; *Suramerica*, 44 F.3d at 985 (citing *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)).

With respect to the Japanese GOES imports' "continuing presence" in the U.S. market, the evidence reveals that Japanese GOES was, in fact, sold in the United States during the Review Period, "albeit at

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<sup>20</sup> As discussed *infra* with respect to likely volume, the ITC found that GOES commands a higher price in the U.S. market than in other markets, and that such higher prices provided an "incentive" for GOES imports from Japan and Italy to be directed to the U.S. market upon revocation of the Subject Orders. Remand Determination at 5.

<sup>21</sup> Plaintiffs do not challenge the ITC's findings with respect to conditions of competition and the condition of the domestic industry. Thus, the court limits its analysis to the findings in dispute.

substantially reduced levels." Final Determination at 9. Indeed, the evidence cited by Plaintiffs shows the reduced levels of Japanese imports after imposition of the Subject Orders. *See supra* n.19. This evidence supports the ITC's finding that Japanese producers have maintained commercial contacts with U.S. customers such that the subject imports have a "continuing presence" in the U.S. market. Second, with respect to the size of GOES industry capacity in Japan, the record reasonably supports the finding that industry capacity was "large," compared to annual U.S. consumption, during the Review Period. *Compare* Staff Report, tbl. I-1 (annual U.S. consumption figures) with tbl. IV-6 (annual Japanese production capacity). Third, the record supports the ITC's finding that the Japanese producers are export-oriented. *See id.* at II-22 ("The two Japanese producers' exports of GOES to third-country markets, as a share of . . . their total GOES shipments, averaged [[ ]] by quantity during [the Review] [P]eriod. . .").

There is, however, evidence that fairly detracts from the ITC's finding that the Japanese GOES imports would likely have a discernible adverse impact on the domestic industry, and this evidence must be accounted for on remand. First, the most recent data with respect to capacity utilization suggests that, because the Japanese producers are operating at high capacity utilization rates, increases in volume are not at all likely. Staff Report at II-21 (stating "the currently high level of capacity utilization suggests *no ability* of the Japanese producers to increase GOES exports to the United States in response to an increase in demand." (emphasis added)); *see also Usinor*, slip op. 02-70 at 24-25 (finding, *inter alia*, ITC's failure to address most recent capacity utilization data rendered decision to cumulate German imports unsupported by substantial evidence).<sup>22</sup> Second, according to the Staff Report, [[ ]]

], i.e., their European, Asian, Mexican and Canadian customers, reduce the likelihood that these producers would be able to significantly increase their imports to the United States in a reasonably foreseeable time.<sup>23</sup> Staff Report at II-22. Specifically, the ITC staff concluded that the existence of such contracts

<sup>22</sup> Capacity utilization rates declined for the Japanese producers from [[ ]] percent in 1997 to [[ ]] percent in 1998 but rose to [[ ]] percent in 1999. Staff Report, tbl. IV-6. In the Remand Determination, the ITC noted the high capacity utilization rates in interim 2000, [[ ]], but concluded that these rates would "likely fluctuate for the foreseeable future." Conf. Remand Determination at 11 n.56. The ITC thus found that "appreciable unused capacity" existed for the Japanese producers. *Id.* at 9. The court cannot sustain this finding. The ITC seems to have concluded that merely because utilization rates have fluctuated in the past, they are likely to do so in the future, and that they will fluctuate to an extent that would allow levels of exports to the United States the impact of which would be both discernible and adverse. Without more, this does not satisfy the likely standard.

<sup>23</sup> For example, one such contract was entered between [[ ]]  
[[ ]] Staff Report at II-22-23.

indicated that exports "may not be readily available in the short run to increase GOES shipments to the United States in response to an increase in GOES demand." *Id.* at II-23. Third, the ability to expand capacity was found to be limited, and the ITC itself concluded on remand that "subject producers indicate[d] that they have no plans to increase capacity within the foreseeable future." Remand Determination at 9.

With respect to Italy, the record supports the ITC's finding that the Italian imports have maintained a continuing, although minimal, presence in the U.S. market. Staff Report at II-19 (indicating that exports of GOES from Italy to the United States during the Review Period accounted for [[ ]] by quantity of total Italian shipments). The record also supports the ITC's finding that industry capacity in Italy has grown since the original investigation. *Id.*, tbl. IV-2. Further, the court agrees that the record substantially supports the finding that AST is export-oriented. The evidence indicates that during the Review Period, "[e]xports of GOES to third-country markets as a share of total shipment quantities averaged [[ ]] . . . ." *Id.* at II-19-II-20 & tbl. IV-2. The share of the total quantity of shipments shipped in the home market during the Review Period was [[ ]]. *See id.*, tbl. IV-2.

Other record evidence, however, fairly detracts from the ITC's finding that Italian GOES would likely have a discernible adverse impact on the domestic industry. First, AST's capacity utilization rate during the most recent period remained high, and according to the Staff Report, this "suggests that there is *little ability* of AST to increase exports to the United States in response to an increase in demand."<sup>24</sup> Staff Report at II-19 (emphasis added). Second, evidence on the record suggests that the Italian producer would not likely increase its GOES production capacity due to the high costs and length of time required to do so. *Id.* Indeed, as with Japan, the ITC found on remand that the Italian producer "indicate[d] that [it has] no plans to increase capacity within the foreseeable future. . . ." Remand Determination at 9.

While substantial evidence is "something less than the weight of the evidence," the court is not convinced that the ITC has sufficiently supported its discernible adverse impact findings and thus must remand the matter. *Consolo*, 383 U.S. at 620; *Nippon Steel Corp. v. United States Int'l Trade Comm'n*, 345 F.3d 1379, 1381 (Fed. Cir.

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<sup>24</sup> While AST's capacity utilization rates were high throughout the Review Period, capacity utilization rates declined from [[ ]] percent in 1997 to [[ ]] percent in 1999. Staff Report, tbl. IV-2. Noting AST's high capacity utilization rates in interim 2000—[[ ]] percent—the ITC nonetheless concluded that the rates had fluctuated during the 1997 to 1999 period, they would "likely fluctuate for the foreseeable future," and thus found that appreciable unused capacity existed for the Italian producer. Conf. Remand Determination at 11 n.56. As noted *supra* note 22, this is insufficient to support a finding of likely future fluctuation of capacity utilization levels.

2003). The court is mindful that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence"; however, the ITC must explain its findings and support them with substantial evidence in the first instance. *Consolo*, 383 U.S. at 620. Here, the evidence must support a conclusion of "likely" consistent with the court's earlier ruling on this issue, i.e., that likely means probable. In light of the evidence of record that detracts from the ITC's findings with respect to the likely discernible adverse impact of Japanese GOES imports and the likely discernible adverse impact of Italian GOES imports, the court cannot find that substantial evidence supports these determinations. *Universal Camera*, 340 U.S. at 488; *Suramerica*, 44 F.3d at 985. Accordingly, the court remands this matter for further consideration by the ITC.

On remand, the ITC shall clearly address the following evidence and explain its effect on the ITC's discernible adverse impact determination: (1) with respect to Japan: (a) interim 2000 capacity utilization data, indicating that it is unlikely that the Japanese producers will increase exports to the United States, *see supra* n.22, (b) [[

]], and (c) the evidence with respect to the Japanese producers' inability to increase production capacity; and (2) with respect to Italy: interim 2000 capacity utilization data, indicating that it is unlikely that the Italian producer will increase exports to the United States, *see supra* n.24, and the evidence with respect to AST's inability to increase production capacity. In addition, as discussed *supra* in footnote 18, the ITC shall state with specificity which of its findings with respect to likely volume, price effects, and impact it took into consideration in arriving at its discernible adverse impact determination, including specific citation to any documents taken into consideration, and explain clearly its reasons for relying on such document and its analysis in arriving at its findings.

#### ***B. Likely Reasonable Overlap of Competition Between Imports from Japan and Imports from Italy***

Cumulative assessment of imports, pursuant to 19 U.S.C. § 1675a(a)(7), involves not only a determination of whether GOES imports from Japan and GOES imports from Italy would each likely have a discernible adverse impact on the domestic industry, but also an examination of whether "such imports would be likely to compete with each other and with domestic like products in the United States market." 19 U.S.C. § 1675a(a)(7).

The question the ITC is required to ask, when deciding whether to cumulate imports from different countries in the context of a sunset review, is whether a reasonable overlap in competition between the subject imports, and between subject imports and the domestic like

product, likely would exist if the orders under review were revoked. See *Wieland Werke, AG v. United States*, 13 CIT 561, 563, 718 F. Supp. 50, 52 (1989); *Indorama Chems. (Thail.) v. United States Int'l Trade Comm'n*, 26 CIT \_\_\_, \_\_\_, slip op. 02-105 at 17 (Sept. 4, 2002). In making this determination, the ITC has generally considered (1) the degree of fungibility between imports from different countries and between those imports and the domestic like product, (2) the presence of sales or offers to sell imports from different countries and the domestic like product in the same geographical markets, (3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product, and (4) simultaneous presence in the market. See Final Determination at 8 n.34 (citing *Wieland Werke*, 13 CIT at 563, 718 F. Supp. at 52). "These factors are neither exclusive nor determinative." *Indorama Chems. (Thail.)*, 26 CIT at \_\_\_, slip op. 02-105 at 17. As the decision to cumulatively assess the volume and effect of imports from different countries is made prospectively, in the context of a sunset review determination, the ITC also considers "other significant conditions of competition that are likely to prevail if the orders under review are revoked." Final Determination at 8; see also *Usinor Industeel, S.A.*, 26 CIT at \_\_\_, slip op. 02-152 at 11.

Here, Plaintiffs challenge the ITC's finding that "there likely would be a reasonable overlap of competition . . . between the subject imports [from Japan and Italy] . . . if the orders are revoked." Final Determination at 10. In its review, the ITC examined the four factors set forth in *Wieland Werke*. First, the ITC considered the degree of fungibility between imports from Japan and imports from Italy. The ITC recalled its findings in the original investigation leading to its conclusion that a reasonable overlap of competition between imports did not exist. The ITC originally found that "all imported Italian GOES was conventional, and all but a very small percentage was M-6 grade. By contrast, . . . most Japanese GOES was high-permeability steel, with some conventional, primarily M-3 grade, GOES." *Id.* at 9. This finding was important to the ITC's finding of a lack of competition between the imports in its original investigation "because purchasers often substituted only one grade up or one grade down, and . . . very few purchasers bought both the Italian and Japanese product." *Id.* Second, with respect to channels of distribution, the ITC noted that it had originally found that "Japanese GOES was sold directly to transformer manufacturers, whereas Italian GOES was sold to stampers who laminated the product and then sold it to makers of small transformers or appliances." *Id.*

Noting that the "differences in product type and channels of distribution between recent subject imports have not changed since the

original determination," for purposes of the sunset review,<sup>25</sup> the ITC nonetheless "[did] not find them significant enough to prevent [it] from concluding that there [was] likely to be a reasonable overlap of competition" between Japanese and Italian imports of GOES. Final Determination at 9-10. The ITC explained:

In a five-year review, the proper focus is on the likely post-revocation behavior, and the composition of current imports, affected by the discipline of an antidumping or countervailing duty order, is not necessarily indicative of likely post-revocation competition. While current imports may be specialized or limited to a particular grade, subject producers in both Italy and Japan *can and do produce a broad range of GOES products*. Over [ ] of its shipments to both Canada and Mexico were of conventional GOES in 2000. For example, while Japan sells primarily high permeability GOES to the U.S. market, it also sells significant amounts of conventional GOES grades to other markets. Similarly, while Japanese producers currently sell directly primarily to end-users in the United States, *this pattern of sales is likely to change with an alteration in the product mix shipped to the United States*. Indeed, Japanese subject producers sell to laminators/slitters for subsequent sale of the GOES in Mexico and presumably could do so in the United States.

*Id.* at 10 (emphasis added) (citations omitted). Thus, the ITC reversed its position from the original investigation, and concluded that a likely overlap of competition would exist between imports from Japan and Italy if the Subject Orders were revoked.<sup>26</sup>

### 1. Fungibility

Plaintiffs argue that it is unlikely that the Japanese and Italian producers will sell similar products in the U.S. market. Specifically, Plaintiffs argue that the Japanese producers do not make the type of

<sup>25</sup> In this sunset review, the ITC noted with respect to product type that, in fact, "subject imports from Italy have consisted exclusively of conventional GOES (M-6 grade), while subject imports from Japan have consisted nearly entirely of high permeability grades of GOES." Final Determination at 9. As for common or similar channels of distribution, the ITC noted that "subject imports from Italy are largely sold to slitters/stampers before being sold to end-users, while the Japanese products are sold directly to a few customers." *Id.* at 9-10.

<sup>26</sup> With respect to simultaneous presence and sales or offers to sell in the same geographic market, the ITC noted that these factors were "less easy to evaluate, given that, since the orders were imposed, U.S. imports of the subject product from both Italy and Japan have declined substantially." Final Determination at 10. Relying on its finding in the original investigation that imports from Japan and Italy were simultaneously present and "generally competed directly with the domestic product nationwide," the ITC concluded that these factors weighed in favor of a finding that there was likely to be a reasonable overlap of competition between imports. *Id.*

conventional GOES used in the United States—a thin gauge GOES for use in wound core transformers—and that the record indicates that the Japanese producers do not intend to start exporting conventional GOES to the United States. Pls.' Mem. at 11–12. Rather, Plaintiffs contend that the Japanese producers “only sought to have the subject orders removed so as to better serve their existing customers for *high-end, high-permeability GOES*.” *Id.* at 12 (emphasis in original) (citing ITC Hearing Tr. (Jan. 11, 2001) (“Tr.”), List 1, Doc. 56 at 159 (testimony of Mr. Mitsuru Tsukakoshi)).

In addition, Plaintiffs contend that “the record provides no basis to believe that [AST] would change its U.S. product mix.” Pls.' Mem. at 10. Plaintiffs contend that at all times, GOES imported from Italy was conventional, and while AST is capable of producing high permeability GOES, the record suggests that it would not export high permeability GOES to the United States. *Id.* at 10–11 (citing, *inter alia*, AST's Posthearing Br., List 1, Doc. 60, List 2, Doc. 29 at A–1 (“AST has not shipped high-permeability GOES to Mexico or Canada, even though it had the ability to do so. . . . AST has not sold high-permeability GOES outside of Europe.”). Plaintiffs assert that merely because “AST theoretically may be capable of changing its product mix and competing against Nippon Steel and Kawasaki for high-permeability sales in the United States (or vice-versa), [this,] without more, is an insufficient basis upon which to deem such competition likely.” *Id.* at 14 (citing *Cheflene Corp.*, 26 CIT at \_\_\_, 170 F. Supp. 2d at 1333). In sum, Plaintiffs argue that, the fact that both Japanese and Italian GOES producers “can and do produce a broad range of GOES products,” Final Determination at 10, “says very little . . . about what these producers either *intend* to do or actually *could* do with respect to sales in the U.S. market if the orders were lifted.” Pls.' Mem. at 10 (emphasis in original).

The ITC contends that its fungibility finding is supported by substantial evidence, arguing that “subject producers would likely produce similar types of GOES for sale in the U.S. market,” Def.'s Mem. at 23, and that the conditions of competition make it likely that “Italian and Japanese producers will . . . ship both high-permeability and conventional GOES to satisfy U.S. demand.” *Id.* at 24. The ITC further argues that competition between conventional and high permeability GOES will grow. According to the ITC, GOES purchasers will increase their “use of lower, less efficient, and less costly grades of GOES in transformer manufacture” as a result of the deregulation of the electric utilities in the United States. Final Determination at 14. In addition, “[r]elative decreases in prices of higher-grade GOES would likely result in a purchaser switching to a better grade in order to produce a low-efficiency transformer, as core performance could be significantly enhanced, thus heightening competition between high-permeability and conventional GOES.” Def.'s Mem. at 24.

In evaluating the substantiality of the record evidence, the court looks at the record as a whole, taking into account any evidence that fairly detracts from its weight. *Universal Camera*, 340 U.S. at 488; *Suramerica*, 44 F.3d at 985 (citing *Atl. Sugar, Ltd.*, 744 F.2d at 1562). The court recognizes, as this Court and the Court of Appeals for the Federal Circuit have recognized, the unique circumstances present in a sunset review that bear on the type of evidence produced at the administrative level:

In no case will the Commission ever be able to rely on concrete evidence establishing that, in the future, certain events will occur upon revocation of an antidumping order. Rather, the Commission must assess, based on currently available evidence and on logical assumptions and extrapolations flowing from that evidence, the likely effect of revocation of the antidumping order on the behavior of the importers.

*Ugine-Savoie Imphy v. United States*, 26 CIT \_\_\_, \_\_\_, 248 F. Supp. 2d 1208, 1222 (2002) (quoting *Matsushita*, 750 F.2d at 933). The court nonetheless finds that it cannot sustain the ITC's fungibility finding.

While it is undisputed that the Japanese and Italian subject producers "can and do produce a broad range of GOES products," Final Determination at 10, it is not clear that the Japanese and Italian producers would sell the same or similar product to the United States. Specifically, the following evidence detracts from such a finding. First, according to questionnaire responses submitted by the Japanese producers with respect to demand factors, the type of conventional GOES they export to third country markets is a thicker gauge than the GOES favored by U.S. purchasers, and "not compatible with the [conventional GOES] used in the United States." Pls.' Mem. at 11; Japanese Producers' Prehearing Br., List 1, Doc. 50, List 2, Doc. 14 at 32; [[ ] Foreign Producer Questionnaire Resp., List 2, Doc. 59 at 44 (indicating [[

]]). Second, the testimony of Mr. Mitsuru Tsukakoshi, a Nippon representative, further indicates that the Japanese producers do not intend to start exporting conventional GOES to the United States.<sup>27</sup>

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<sup>27</sup> Mr. Tsukakoshi stated:

Nippon Steel has very limited export objectives with respect to the U.S. GOES market. Our interest in this market has been and will continue to be to sell small quantities of high-permeability products, particularly domain refined, that are not available from the U.S. industry. . . . [T]he focus of Nippon Steel's exports has been on other markets, particularly in Asia, where there is a greater demand for our products and where we had strong relationships. We see nothing in the future that will change that focus. . . . Nippon Steel is currently operating at full capacity. We are turning away some customers' inquiries and extending the requested delivery times for others. Again, we see nothing to change that situation in the future.

Moreover, with respect to pre- and post-revocation behavior,<sup>28</sup> the ITC found the following. With respect to Japan, it is clear that prior to the imposition of the Subject Orders, the Japanese producers exported high permeability GOES and "some conventional, primarily M-3 grade, GOES." *Id.* at 9. It is also clear that after the imposition of the Subject Orders, the Japanese producers exported almost exclusively high permeability GOES to the United States. *Id.* With respect to Italy, imports consisted entirely of conventional (M-6 grade) GOES both before and after the imposition of the Subject Orders. *Id.*

While the ITC indicates that it took pre-order sales of conventional GOES into consideration, it is unclear how these past sales of "some conventional, primarily M-3 grade, GOES" favor a finding that Japanese and Italian conventional GOES would export a fungible product to the United States. Final Determination at 9. One of the conditions of competition found to exist was an increase in the "use of lower, less efficient, and less costly grades of GOES in transformer manufacture." *Id.* at 14. However, the ITC made no finding as to whether the Japanese producers would likely produce and sell M-3 grade conventional GOES, or another grade of conventional GOES, for export to the United States. Plaintiffs argue that the Japanese producers do not make the type of conventional GOES used in the United States, and that it is the Japanese producers' intention to "sell small quantities of high-permeability products, particularly domain refined, that are not available from the U.S. industry." Tr. at 159; Pls.' Mem. at 12. At no point does the ITC adequately explain how, taking into account this evidence, it is probable that the Japanese producers will export a type of conventional GOES, M-3 grade or otherwise, that would likely compete with Italian conventional GOES.<sup>29</sup>

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Tr. at 159. The court notes that such evidence "fairly detracts" from the substantiality of the evidence that supports the ITC's finding that the volume of conventional GOES from Japan would likely increase. See *Universal Camera*, 340 U.S. at 488.

<sup>28</sup>The ITC properly considered the Japanese and Italian producers' pre- and post-revocation behavior. See Final Determination at 9 (comparing levels of subject imports before and after the imposition of the Subject Orders); 19 U.S.C. § 1675a(a)(1)(A)-(B); SAA at 884 ("If the Commission finds that pre-order . . . conditions are likely to recur, it is reasonable to conclude that there is a likelihood of continuation or recurrence of injury.").

<sup>29</sup>The court also notes that in the Final Determination, the ITC stated that during the original investigation the type of GOES exported by the Japanese producers did not compete with Italian conventional GOES because "purchasers often substituted only one grade up or one grade down, and . . . very few purchasers bought both the Italian and Japanese product." Final Determination at 9. Evidence on the record suggests that this has not changed. See Staff Report at II-31 ("Purchasers generally indicated in their questionnaire responses that the strength of substitution among the various grades of GOES was moderate, limited, or weak. . . . It is not economical . . . to substitute down one grade (i.e., M-6 for M-5)."). Without further explanation as to what grade of conventional GOES, if any, the Japanese producers are likely to export to the United States, it is impossible to gauge whether Japanese and Italian imports would likely compete, since the evidence indicates

With respect to Italy, the ITC found that the Italian producer "can and [does] produce a broad range of GOES products," Final Determination at 10, but does not go any further in its analysis of whether the Italian producer would likely export high permeability GOES to the United States, except to say that "AST may seek to sell some of its high-permeability products in the United States in view of the [[ ] . . . selling these products in the United States and its increased production of high-permeability GOES." *Id.* (citing AST's Posthearing Br., List 2, Doc. 29 at A-1; Petitioners' Prehearing Br., List 2, Doc. 16, Ex. 3). Without more, the ITC has merely shown that it is now possible for AST to export high permeability GOES to the United States, which, of course, is insufficient to satisfy the likely standard. *Nippon III*, 26 CIT at \_\_\_\_ , slip op. 02-153 at 16.<sup>30</sup>

Even considering the prospective nature of a sunset review and the difficulty with which the ITC is faced in gathering concrete evidence of likely future events, the court is not convinced, in light of the detracting evidence, that the ITC has substantially supported, and adequately explained, its determination that the Japanese and Italian producers will likely sell a fungible GOES product in the United States. On remand, the ITC shall explain in detail why it is probable that the Japanese producers will export a type of conventional GOES, M-3 grade or otherwise, that would likely compete with Italian conventional GOES, taking into account the following: (a) evidence that the type of conventional GOES produced by the Japanese producers for export to third country markets is different in thickness than the GOES favored by U.S. purchasers, and (b) evidence that the Japanese producers intend to "sell small quantities of high-permeability products, particularly domain refined, that are not available from the U.S. industry." Tr. at 159. In addition, the ITC shall explain in detail how it is probable that the Italian producer will export high permeability GOES such that it would likely compete with Japanese high permeability GOES. The ITC shall address its evidence in the context of an explanation as to whether it is likely, not merely possible, that the subject producers will change their respective product mixes such that Japanese GOES and Italian

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that purchasers do not find it economically feasible to substitute all grades of conventional GOES equally.

<sup>30</sup> While AST was [[ ]

]] to the United States prior to the Subject Orders being put in place, AST has not been constrained by [[ ] since 1998, i.e., a time that falls within the Review Period. Staff Report at II-18. The lack of any sales of high permeability GOES in the United States, despite the ability to do so since 1998, would seem to further undermine the finding that Italian sales of high permeability GOES would be likely.

GOES will likely compete in the U.S. market. *Nippon III*, 26 CIT at \_\_\_, slip op. 02-153 at 16.

## 2. Channels of Distribution

Plaintiffs argue that the ITC's channels of distribution finding is flawed because it is based on unsupported assumptions. Plaintiffs contend that the ITC incorrectly (1) assumed that Japanese producers "are likely to alter their U.S. product mix if the subject orders are revoked," in order to sell conventional GOES to the United States and (2) assumed "that the Japanese producers' distribution patterns would change, such that the Japanese and Italian producers would both sell to laminators/distributors." Pls.' Mem. at 13, 12. Plaintiffs argue the record supports neither of these assumptions and contends that the ITC's findings are

devoid of any analysis or record support as to *why* . . . a change in the Japanese producers' product mix would cause them to sell more GOES through laminators/slitters, or why such a change would increase competition with Italian imports. Rather, the ITC's findings rest simply on *speculation* that the Japanese producers would carry over their Mexican sales practices to the United States—a fact that the Commission itself seems to recognize.

*Id.* at 13 (emphasis in original) (citing Final Determination at 10).

The ITC argues in favor of the conclusion that the Japanese producers' pattern of sales (to end users) and thus, channels of distribution, is likely to change with an alteration in the product mix shipped to the United States. As the ITC stated in the Final Determination, "Japanese subject producers sell to laminators/slitters for subsequent sale of the GOES in Mexico and presumably could do so in the United States." Final Determination at 10. In support of this conclusion, the ITC argues that "the record shows that both Japanese and Italian subject producers sell to laminators/slitters in Mexico." Def.'s Mem. at 28. The ITC stresses that "[Plaintiffs'] sales practices (selling GOES to laminators/slitters) in Mexico hinge[ ] on what type of GOES is sold." *Id.* at 27-28. The ITC concludes that "[g]iven that Japanese subject producers would likely sell appreciable quantities of conventional GOES in the United States," due to, *inter alia*, the increase in U.S. demand for conventional grades of GOES, "it would be likely that Japanese subject producers would sell to end users and laminators/slitters in the United States as well." *Id.* at 28 (emphasis in original).

The court finds that the ITC's conclusion that Japanese and Italian producers are likely to sell in the same or similar channels of distribution is unsupported by substantial evidence. Here, the ITC determined that the Japanese producers would "presumably" start to sell to laminators/slitters in the United States based on an antici-

pated change in the product mix sold by the Japanese producers in the United States, i.e., "that Japanese subject producers would likely sell appreciable quantities of conventional GOES in the United States. . . ." Def.'s Mem. at 28. However, as discussed above, the ITC has not demonstrated that such a change in product mix sold in the United States would be likely. The ITC's finding that the Japanese producers would sell conventional GOES in the United States, such that Japanese and Italian GOES would likely compete, is unsupported by substantial evidence. Therefore, the basis on which the ITC's determination with respect to channels of distribution rests is questionable. Moreover, while it may not be logistically impossible, concluding that the Japanese producers "presumably" could sell conventional GOES to laminators/slitters in the United States because it has been doing so in Mexico and Canada is not enough to satisfy the likely standard.

While the ITC has discretion in the area of cumulation, it must nonetheless support its decisions with substantial evidence. It has not done so here. On this second remand, the ITC shall, taking into account its finding on remand with respect to fungibility, revisit its finding that the Japanese and Italian producers of GOES will change their patterns of sale, such that "common or similar channels of distribution" for imports from Japan and Italy exist, and an overlap of competition between Japanese and Italian GOES imports would be likely. *Wieland Werke*, 13 CIT at 563, 718 F. Supp. at 52. The ITC shall support those explanations with substantial evidence that the Japanese and Italian producers will both likely sell to end users, or laminators/slitters.

## II. LIKELIHOOD OF CONTINUATION OR RECURRENCE OF MATERIAL INJURY

Ultimately, the ITC is charged with the duty of determining whether revocation of an antidumping or countervailing duty order would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. In making this determination, the ITC is instructed by statute to consider "the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked. . . ." 19 U.S.C. § 1675a(a)(1). In reaching its determination, the ITC "shall take into account":

- (A) its prior injury determinations, including the volume, price effect, and impact of imports of the subject merchandise on the industry before the order was issued . . . ,
- (B) whether any improvement in the state of the industry is related to the order . . . , [and]

(C) whether the industry is vulnerable to material injury if the order is revoked . . .

19 U.S.C. § 1675a(a)(1)(A)–(C).<sup>31</sup> “The presence or absence of any factor which the Commission is required to consider . . . shall not necessarily give decisive guidance with respect to the Commission’s determination of whether material injury is likely to continue or recur within a reasonably foreseeable time. . . .” 19 U.S.C. § 1675a(a)(5); SAA at 886 (“[T]he Commission must consider all factors, but no one factor is necessarily dispositive.”). The ITC determined in these sunset reviews that there was a likelihood of continuation or recurrence of material injury if the Subject Orders were revoked. See Final Determination at 20; Remand Determination at 17. Plaintiffs challenge the ITC’s likely volume, price effect, and impact determinations as unsupported by substantial evidence.

### **A. Likely Volume**

Title 19 U.S.C. § 1675a(a)(2) governs the ITC’s determination of likely volume. It states:

In evaluating the likely volume of imports of the subject merchandise if the order is revoked . . . the Commission shall consider whether the likely volume of imports of the subject merchandise would be significant if the order is revoked . . . either in absolute terms or relative to production or consumption in the United States. In doing so, the Commission shall consider all relevant economic factors, including—

- (A) any likely increase in production capacity or existing unused production capacity in the exporting country,
- (B) existing inventories of the subject merchandise, or likely increases in inventories,
- (C) the existence of barriers to the importation of such merchandise into countries other than the United States, and
- (D) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.

19 U.S.C. § 1675a(a)(2)(A)–(D). In *Nippon III*, the court found that the ITC had not demonstrated that it had considered these factors,

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<sup>31</sup>Title 19 U.S.C. § 1675a(a)(1)(D), relating to duty absorption, was not relevant in these investigations, as “Commerce [did] not issue[] any duty absorption determinations in the instant reviews.” See Final Determination at 12 n.59.

nor had the ITC evaluated whether the likely volume of imports would be significant either in absolute terms or relative to production or consumption in the United States. Thus, the court instructed that on remand, "such consideration must be reasonably discernible." *Nippon III*, 26 CIT at \_\_\_, slip op. 02-153 at 14.

In its Remand Determination, the ITC concluded that "the likely volume of subject imports would be significant in terms of U.S. production and U.S. apparent consumption if the countervailing and antidumping duty orders were revoked." Remand Determination at 10-11. As to its consideration of the factors enumerated in 19 U.S.C. § 1675a(a)(2)(A)-(D), the ITC found, with respect to "any likely increase in production capacity or existing unused production capacity in the exporting country," 19 U.S.C. § 1675a(a)(2)(A), that the "subject producers indicate[d] that they have no plans to increase capacity within the foreseeable future. . . ." Remand Determination at 9. However, the ITC also found that "existing GOES production capacity in both [Japan and Italy] [was] substantial," and that "subject producers [had] appreciable unused capacity that could be used to produce subject merchandise for the U.S. market if the orders were revoked." *Id.* As to the factors enumerated in 19 U.S.C. § 1675a(a)(2)(B)-(D), the ITC found that the nature of the GOES industry prevented these factors from having much relevance. The ITC stated, "[T]he lack of inventories, absence of barriers to importation in other markets, and limited potential for product shifting, did not outweigh other factors which led [the ITC] to conclude that the likely volume of imports would be significant if the orders were revoked." *Id.* at 3. These other factors include: (1) the nature of supply and demand in the GOES industry, (2) the export orientation of the subject producers, (3) the range of GOES products offered by Japanese and Italian producers, (4) pricing practices in the United States and other countries during the original and the review periods of investigation (including the incentive of higher prices in the U.S. market as compared with other markets), and (5) patterns of shipments to other markets into which the subject imports are sold. *Id.* at 4.

Plaintiffs argue that the record does not support the ITC's conclusion that likely volume would be significant in terms of U.S. production and consumption.<sup>32</sup> To the contrary, Plaintiffs maintain that "the facts, information and data concerning each of [the four factors

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<sup>32</sup>The grounds on which Plaintiffs challenge the ITC's likely volume determination are substantially similar to those made with respect to the ITC's discernible adverse impact finding. Plaintiffs assert that the factors considered by the ITC and the evidence relied upon do not show that significant exports would be probable, but rather merely show that it is conceivable or possible to export "significant quantities of GOES to the United States in the future. . . ." Pls.' Comments at 15. While Plaintiffs concede that "it is true that there are no major logistical impediments to the shipment of GOES to the United States, . . . that the subject producers have significant export sales, and that their production capacity is large, these and other factors identified by the ITC show only that the subject producers have the

set out in 19 U.S.C. § 1675a(a)(2)] provide substantial evidence that the volume of subject imports likely would *not* be 'significant'. . . ." Pls.' Comments at 7 (emphasis in original); Pls.' Mem. at 23-25. In particular, Plaintiffs assert that: (1) "uncontested evidence shows that GOES producers in Japan and Italy have virtually no unused GOES production capacity and have no plans (and little ability) to add to their existing capacity," Pls.' Mem. at 23 (citation omitted); Pls.' Comments at 8 ("During the first nine months of 2000—the most recent period for which data were collected—the subject producers did *not* have excess capacity that could be used to produce significant quantities of GOES for the U.S. market." (emphasis in original)); (2) "the record shows that subject GOES inventories are effectively non-existent (and thus do not provide Japanese and Italian producers with a means of making significant U.S. sales)," Pls.' Mem. at 23-24 (citations omitted); (3) "there are no trade barriers in other countries that would cause GOES shipments to be directed towards the United States," *id.* at 24 (citations omitted); and (4) "the specialty equipment used to manufacture GOES [i.e., box-annealing equipment and, in the case of domain refined GOES, laser or mechanical scribing equipment,] precludes the subject producers from switching production away from other products in order to increase their U.S. GOES sales." *Id.* Plaintiffs complain that the ITC "gave almost no weight to this evidence." Pls.' Comments at 7.

Plaintiffs also take issue with the ITC's conclusion that the "purportedly higher prices made the U.S. market 'particularly attractive' and provided the subject producers with 'a primary incentive' to ship significant quantities of GOES to the United States." Pls.' Comments at 17 (citing Remand Determination at 6, 4). For example, Plaintiffs minimize the significance of the Japanese producers' sales of high permeability GOES in the United States [

] by noting that "only a tiny quantity of GOES [was sold] in the United States during the period of review," and "the record shows that those sales were made to U.S. customers that were willing to pay a premium for the Japanese product." *Id.* (citations omitted). Plaintiffs argue that the subject producers could not supply significant quantities of GOES to the United States without sacrificing sales to other customers because of high capacity utilization rates. *Id.* at 18.<sup>33</sup>

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physical ability to export GOES to the United States." *Id.* (emphasis in original). Plaintiffs' additional arguments are addressed below.

<sup>33</sup> Plaintiffs cite evidence "relating to other economic factors that further illustrates why subject imports could not be significant," including: (1) "[e]vidence that orders from the subject producers' existing GOES customers in other countries will continue to grow rapidly due to strong world-wide GOES demand," (2) "[e]vidence that U.S. GOES demand has shifted significantly since the original [ ] (1994) investigation, such that domestic purchasers now predominantly favor a variety of GOES (conventional GOES) which the Japanese producers have never commercially exported to the United States," (3) "[e]vidence that U.S.

The ITC argues that it complied with the court's instructions in *Nippon III* by considering each of the statutory factors set forth in 19 U.S.C. § 1675a(a)(2), as well as other relevant economic factors. Def.'s Comments at 2-3. The ITC further argues that, given the nature of the GOES industry, it properly found that the lack of inventories, the absence of barriers to entry of the subject merchandise into third country markets, and the limited potential for the Japanese and Italian producers to product shift, were "not dispositive or indeed particularly meaningful." *Id.* at 4.

As to the finding that the Japanese and Italian GOES producers had "significant production capacity," the ITC argues that "that the aggregate capacity for both countries was [[

]] of total U.S. consumption and U.S. production capacity of GOES for [1999]." Def.'s Comments at 5; see Conf. Remand Determination at 10-11. Moreover, although, as Plaintiffs point out, interim data from 2000 show high capacity utilization rates, i.e., [[ ] for Japanese producers and [ ] for the Italian producer, the ITC claims it did not err in finding that "appreciable unused capacity" existed. Def.'s Comments at 6, 5. The ITC argues that "reported capacity utilization rates fluctuated over the period of review, and . . . that they will likely fluctuate for the foreseeable future." *Id.*; Remand Determination at 10 & n.56. With respect to other evidence that Plaintiffs argue shows that subject import volume would likely not be significant, i.e., that the demand for GOES among the subject producers' existing customers was projected to grow rapidly, the ITC contends that "the ITC did not ignore this evidence but came to a different conclusion than did plaintiffs." Def.'s Comments at 7. Specifically, the ITC found that shipments to other markets have been "erratic" and that GOES sells at higher prices in the U.S. market than in other markets. *Id.* The ITC claims that this led to its conclusion that "despite increased demand in subject producers' other export markets, the U.S. market would be a far more attractive market for subject producers seeking the highest price for their product." *Id.* In defense of its finding that GOES commands a higher price in the United States than in third country markets, the ITC insists that "the record contains numerous examples that subject producers' prices for the various grades of the subject product sold in Canada and Mexico are below current domestic prices for competing grades." *Id.* at 11 (citing Petitioners' Prehearing Br., List 2, Doc. 16, Ex. 1 at 64-66; Remand Determination at 6 n.24).

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GOES demand and production have been growing strongly, thus ensuring that subject imports into the United States would not be 'significant' in relative terms, even if they were to increase," and (4) "[e]vidence that GOES producers in Germany and France that are affiliated with AST have not exported significant quantities of GOES to the United States, although they were not subject to antidumping or countervailing duty orders." Pls.' Mem. at 25-26 (citations omitted).

The court finds that the ITC has complied with the instruction in *Nippon III* to "demonstrate . . . (a) that it . . . consider[ed] each of the four factors outlined in 19 U.S.C. § 1675a(a)(2)(A)-(D); and (b) that it considered whether, were the Subject Orders revoked, the likely volume of imports of the subject merchandise would be significant either in absolute terms or relative to production or consumption in the United States, pursuant to 19 U.S.C. § 1675a(a)(2)." *Nippon III*, 26 CIT at \_\_\_, slip op. 02-153 at 16. It is evident in the Remand Determination that the ITC considered the factors enumerated in 19 U.S.C. § 1675a(a)(2)(A)-(D) and explained why it considered each factor relevant or not. *See* Remand Determination at 3 & nn.22, 54, 55. Furthermore, the ITC considered the significance of likely volume if the Subject Orders were revoked relative to U.S. production and consumption. *See, e.g.,* Conf. Remand Determination at 10, 11 ("In 1999, the last full year for which data were available, the total capacity for both countries was [[ ] total U.S. consumption and U.S. production of GOES for the same period." With respect to unused capacity, the ITC found that "[i]n 1999, subject producers . . . had [[ ] short tons of unused capacity, which was equivalent to [[ ] percent of U.S. production and [[ ] percent of U.S. apparent consumption for the same year.").

The court notes the following with respect to whether substantial evidence supports the ITC's finding that GOES prices in the U.S. market are higher, and therefore would likely attract imports. Affidavits submitted by petitioners reveal that the prices at which GOES was sold in the United States are higher than the prices at which it was sold in third country markets. *See* Petitioners' Prehearing Br., List 2, Doc. 16, Exs. 11 (Aff. of Robert D. Ross) & 12 (Aff. of Robert I. Psyck). With respect to Japan, this evidence indicates that the purchase price for Japanese GOES was lower than comparable products sold in third country markets. *See id.*, Ex. 12 at 2 ([

])). With respect to Italy, the evidence supports a finding that Italian GOES was purchased at a lower price in third country markets than in the U.S. market. *Id.*, Ex. 11 at 1-2 ("[T]he actual purchase price for AST's M-6 slit product delivered to [Canada] [was] at [

]]. . . . The typical domestic price of Allegheny Ludlum's M-6 product is [

]]. Allegheny Ludlum's cost to produce M-6 product is [

]]. Thus, AST is selling its M-6 product at a price [in Canada] that is [

]]. our cost to produce."]. This evidence reasonably supports the conclusion that GOES commands a higher price in the U.S. market than in other markets.

However, in light of the questions to be addressed on remand with respect to likely discernible adverse impact and likely reasonable overlap of competition, the court remands the ITC's likely volume determination for further consideration. In particular, the ITC is instructed to revisit and explain in detail, with specific citations to the record, its determination that likely volume would be significant in light of the following evidence: (1) with respect to Japan: (a) high capacity utilization rates data reported for 2000,<sup>34</sup> (b) [[

]], (c) the evidence relating to whether the Japanese producers would likely export conventional GOES to the United States such that it would compete with Italian conventional GOES, and (d) whether it is likely that the Japanese producers' patterns of sale will change; and (2) with respect to Italy: (a) whether it is likely that AST will sell high permeability GOES to the United States such that it would compete with Japanese high permeability GOES, and (b) whether it is likely that the Italian producer's patterns of sale will change. The ITC shall also reconsider the above in light of the increase in U.S. demand and domestic production capacity, and strong worldwide demand for GOES, and explain whether these conditions of competition would prevent significant quantities of GOES sales to the United States. Should the ITC decide not to cumulate the subject imports from Japan and Italy, it shall amend its likely volume determination accordingly.

### **B. Likely Price Effects**

Title 19 U.S.C. § 1675a(a)(3) governs the ITC's determination with respect to likely price effects:

In evaluating the likely price effects of imports of the subject merchandise if the order is revoked . . . , the Commission shall consider whether—

(A) there is likely to be significant price underselling by imports of the subject merchandise as compared to domestic like products, and

(B) imports of the subject merchandise are likely to enter the United States at prices that otherwise would have a significant depressing or suppressing effect on the price of domestic like products.

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<sup>34</sup>As noted *supra*, the court cannot sustain the ITC's finding that because utilization rates have fluctuated in the past, they are likely to do so in the future, and that they will fluctuate to an extent that would allow exports to the United States that would be both discernible and adverse. On remand, the ITC shall explain which record evidence supports the finding that fluctuations in capacity utilization levels are likely, such that "appreciable" unused capacity exists, or will exist.

19 U.S.C. § 1675a(a)(3)(A)-(B). According to the SAA, "in considering the likely price effects of imports in the event of revocation . . . , the Commission may rely on circumstantial, as well as direct, evidence of the adverse effects of unfairly traded imports on domestic prices." SAA at 886.

Here, the ITC concluded that "if the orders were revoked, significant volumes of subject imports likely would significantly undersell the domestic like product to gain market share and likely would have significant depressing or suppressing effects on the prices of the domestic like product within a reasonably foreseeable time." Remand Determination at 15; Final Determination at 18-19. The ITC noted several conditions of competition that it found relevant to its underselling and price depression/suppression findings. First, "the domestic like product and subject imports are substitutable." Remand Determination at 11. Second, "price is an important factor in purchasing decisions." *Id.* Third, "domestic prices have fallen during these reviews and are at lower levels than prices during the original investigations" as a result of "downstream competition from increased U.S. imports of both transformers and laminated/stamped GOES, declining average unit costs of U.S. GOES producers, and increased U.S. imports of GOES from non-subject countries compared with the original investigations." *Id.* at 12. The decrease in prices was notable because "it occurred at a time of increasing demand." *Id.*

Based on these conditions of competition and the pricing data available on the record, the ITC affirmatively determined that there would likely be significant price underselling, and price suppression, by imports of GOES, should the Subject Orders be revoked. The ITC noted that "several large purchasers have manufacturing facilities in both Canada and Mexico as well as the United States," and that these purchasers "are buying subject GOES from Italy and Japan for [these facilities] at prices that are lower than prevailing U.S. prices." Remand Determination at 12. Further, the ITC stated that these purchasers "are currently seeking to obtain prices from domestic producers [of] GOES for their U.S. facilities comparable to prices for the subject product shipped to their Canadian and/or Mexican operations." *Id.* at 12-13. Moreover, "heightened competition between domestic GOES purchasers and their competitors in Canada and Mexico" would cause U.S. customers to seek lower-priced subject imports if the Subject Orders were revoked. *Id.* at 13. The ITC found that pressure on U.S. GOES producers to reduce prices, along with the "incentive for the low-priced, subject imports to return to the U.S. market since subject producers would receive a higher price for the product in the U.S. market relative to third country markets," would result in negative price effects from subject imports if the orders were revoked. *Id.*

Plaintiffs argue the record evidence does not support the ITC's price effects determination. First, with respect to the importance of

price, Plaintiffs assert that questionnaire responses show that "availability, delivery time, product consistency, product quality, and reliable supply were actually *more frequently* identified as 'very important' purchasing factors for GOES than was price." Pls.' Comments at 20 (emphasis in original). Second, with respect to the "expectations of several responding importers and purchasers," Remand Determination at 12, Plaintiffs argue that "a close review of [the purchaser questionnaire responses with respect to Japanese GOES cited by the ITC] shows that these [responses] are generally directed at competition in product quality and availability with respect to high-permeability GOES, and not at narrow price competition." Pls.' Comments at 20; *see also id.* at 21 (examining particular questionnaire responses with respect to AST and arguing that these responses indicate that "revocation would have little or no effect"). Third, with respect to the pressure being exerted on U.S. producers to reduce their GOES prices so as to compete with lower-priced imports, Plaintiffs contends that the record is devoid of any evidence "that [large manufacturers with facilities in the United States, Canada, and Mexico] are aggressively pressuring their U.S. suppliers to reduce their prices to supposedly lower levels prevailing in Canada or Mexico." *Id.* at 21-22. Plaintiffs also take issue with the evidence cited by the ITC to show that "prevailing U.S. GOES prices were higher than those charged by the subject producers in Canada or Mexico." *Id.* at 22. In particular, Plaintiffs challenge the propriety of the ITC's use of average unit values of GOES imports temporarily brought into the United States for subsequent export to Canada and Mexico (so called "temporary importation under bond," or "TIB," entries) as evidence of likely underselling.<sup>35</sup>

Finally, Plaintiffs fault the ITC for allegedly "not addressing record evidence that weighs against its finding of 'likely' significant adverse price effects." Pls.' Comments at 23. Specifically, Plaintiffs argue the ITC did not consider: (1) evidence that "domestic produc-

<sup>35</sup>Specifically, the ITC found the following:

Average unit values for U.S. imports of GOES from Japan under temporary importation under bond . . . provisions in 1999 of \$0.49 per pound, were substantially lower than the AUV of \$0.97 per pound for imports for consumption. Similarly, data for U.S. imports from Italy show the AUVs of TIB imports were \$0.43 per pound in 1999, while the AUVs for imports for consumption were at \$0.59 per pound.

Remand Determination at 12 n.67. Plaintiffs argue that *Allegheny Ludlum Corp. v. United States*, 24 CIT 858, 879, 116 F. Supp. 2d 1276, 1297 (2000), *aff'd in part and rev'd on other grounds*, 287 F.3d 1365 (Fed. Cir. 2002) supports the position that "substantial evidence does not support the ITC's use of [AUVs] as specific evidence of price underselling," particularly where the product mix between two markets differ." Pls.' Comments at 22 (quoting *Allegheny Ludlum Corp.*, 24 CIT at 879, 116 F. Supp. 2d at 1297) (bracketing as it appears in Plaintiffs' brief). Plaintiffs contend that here the TIB entries were "less-expensive, semi-finished products," whereas the products imported for consumption in the United States were "primarily . . . finished products sold directly for use by end-users for which [the subject producers] could achieve a price premium." *Id.* at 22-23 (citations omitted).

ers are shielded from import competition through their fixed-price contracts and long-term relationships"; and (2) evidence which Plaintiffs argue shows that "any effect subject imports may have on U.S. prices is *already* being felt." *Id.* at 24 (emphasis in original). With respect to the latter evidence, Plaintiffs highlight the increased levels of U.S. imports of finished transformers and that "GOES from Japan and Italy is currently available from laminator[s]/stampers in Canada and Mexico, who are able to ship stamped GOES to the United States without having to pay dumping duties." *Id.* at 25 (citations omitted).

The ITC characterizes Plaintiffs' arguments with respect to the ITC's likely price effects determination as "merely improper attempts to have the Court reweigh the evidence." Def.'s Comments at 12. First, with respect to Plaintiffs' argument that the ITC exaggerated the importance of price, the ITC argues that "price need not be the most important factor in purchasing decisions to be an important factor in purchasing decisions." *Id.* (citing *Acciai Speciali, S.p.A. v. United States*, 19 CIT 1051, 1059 (1995)). Second, the ITC argues that the questionnaire responses it cited in the Remand Determination indicate "that customers expect the return of lower-priced subject imports following revocation. . . ." *Id.* at 12-13. Third, the ITC argues that "there are numerous examples that prices in Canada and/or Mexico are lower than U.S. prices . . . and the evidence cited . . . is replete with examples of price pressure exerted on domestic producers." *Id.* (citing ABB's Posthearing Br., List 1, Doc. 59, List 2, Doc. 28 at A-1; Petitioners' Posthearing Br., List 2, Doc. 27, Ex. 1 at 61-68). Finally, with respect to the relevance of fixed-price contracts in the U.S. market, the ITC found that "the majority are short term contracts (less than a year in duration) and likely would afford little protection to domestic producers from low-priced imports." *Id.* at 13-14 (citations omitted). As for Plaintiffs' contention that the price effects of the imports are already being felt, the ITC argues that this proposition "rests on the fact that low-priced imports are available to those transformer manufacturers operating outside the United States," and Plaintiffs' argument "ignores the direct price effect that would likely result if those same subject imports return to the U.S. market once the orders are lifted." *Id.* at 14.

After having reviewed these arguments, and in light of the court's decision that remand is appropriate in order to afford the ITC the opportunity to revisit, and, if necessary, revise, its likely volume determination, the court concludes that its likely price effects determination should be remanded as well. This is because it is clear from the Remand Determination that the ITC's finding that likely volume would be significantly affected the ITC's price effects determination. See Remand Determination at 13-14 ("[I]f the orders were revoked, significant volumes of subject imports likely would significantly undersell the domestic like product to gain market share and likely

would have significant depressing or suppressing effects on the prices of the domestic like product within a reasonably foreseeable time.”). The court notes the following, however, with respect to substantial evidence.

First, with respect to substitutability, the evidence demonstrates that the domestic like product and subject imports of GOES from Japan and Italy are substitutable. According to questionnaire responses, “quality, price, and availability, in descending order of importance, were considered to be the top three purchase factors.” Staff Report at II-34. With respect to these purchase factors, the U.S. product, Italian (M-6 grade) GOES, and Japanese high permeability products were rated comparably. *See id.*, tbl. II-2. U.S. GOES was rated superior to Japanese GOES in the categories of availability and lowest price. *Id.* It was rated superior to Italian GOES in the categories of delivery time and reliable supply. *Id.* According to the Staff Report, the ease with which purchasers switch from the U.S. product to subject imports, or vice versa, when prices change, “largely depends upon the degree to which there is an overlap of competition between U.S.-produced and imported GOES, and product differentiation.” *Id.* at II-41 & n.93. In light of the GOES purchasers’ questionnaire responses and the ITC’s undisputed finding that there likely would be an overlap of competition between the domestic like product and Japanese GOES, and between the domestic like product and Italian GOES, the court finds substantial evidence supports the ITC’s substitutability finding.

Second, the court finds that substantial evidence supports the ITC’s finding that price is an important factor in purchasing decisions. As discussed above, price was reported to be one of the top three factors taken into consideration by purchasers. Ten out of fourteen questionnaire responses ranked price as “very important,” and the remaining four ranked price as “somewhat important.” Staff Report, tbl. II-1. The court finds this evidence is such that a reasonable mind might accept as adequate to support the ITC’s finding that price was an important factor in purchasing decisions.

Third, with respect to the expectations of several responding importers and purchasers as to the effects of revocation, the court finds that the questionnaire responses cited by the ITC are varied, but generally support the proposition that greater competition in the U.S. GOES market would likely result. *See* Staff Report at II-43, D-5-D-20; *see, e.g.*, [[ ]] Purchaser Questionnaire Resp., Ques. IV-1, *reprinted in* Staff Report at D-13 (with respect to Italy) (“[[

]); [[

]] Purchaser Questionnaire Resp., Ques. IV-1, *reprinted in*

Staff Report at D-18 (with respect to Japan) ([

])). The court finds this evidence generally supports the ITC's finding that there would be heightened price competition if the Subject Orders were revoked.

Fourth, with respect to the ITC's use of the average unit values of TIB entries as indicators of the "aggressive low prices at which the unfairly traded imports likely would be sold in the U.S. market if the orders were revoked," Remand Determination at 12 n.67, the court finds further explanation is required. The TIB entries are "'not-for-consumption' imports [that] are either slit to a narrower width in the United States and then shipped to Canada or Mexico or . . . simply shipped through the United States to Canada or Mexico." Staff Report at IV-2. Japan reportedly exported "semi-finished GOES products, for which some kind of further processing [was] required" to laminators/slitters in Mexico and Canada in 1999, the year for which the ITC examined AUV data. Japanese Producers' Posthearing Br., List 1, Doc. 58, List 2, Doc. 26 at App. A. That same year, Japan exported only "highly specialized GOES products to a very limited number of purchasers in the United States." *Id.* AST reportedly sold unfinished GOES products to Canada and Mexico. *See* AST's Posthearing Br., List 2, Doc. 29 at A-2. It has been held that the use of AUVs "may be reliable indicators of general price trends, provided the 'product mix' comprising an AUV does not significantly change over time." *Allegheny Ludlum*, 24 CIT at 880, 116 F. Supp. 2d at 1297 (discussing *United States Steel Group v. United States*, 96 F.3d 1352, 1364 (Fed. Cir. 1996)). This holding is designed to ensure an accurate, "apples to apples" assessment of price comparisons in making a price underselling determination. *Id.* In this case, remand is appropriate on the issue of whether the use of AUVs as an indicator of price underselling produced an accurate comparison of price differences, given the questions that exist with respect to whether the grade of GOES likely to be exported to the United States from Japan and that from Italy are fungible. *Cf. Indorama Chems. (Thail.)*, 26 CIT at \_\_\_, slip op. 02-105 at 15 ("The Commission reasonably relied upon average unit value . . . data for the domestic and Thai product, explaining that average unit value data provide a reliable basis for price comparisons because [the subject merchandise] is a fungible commodity product sold in a single grade.").

Fifth, with respect to Plaintiffs' argument that the "domestic producers are shielded from import competition through their fixed-price contracts and long-term relationships," Pls.' Comments at 24, the court finds that the ITC considered the record evidence of short- and long-term contracts and nonetheless found that heightened price competition was likely. *See* Final Determination at 19 ("[A]lthough domestic sales are generally made through short- and long-term contracts, the contracts will afford little protection to the do-

mestic producers as contract terms are often re-negotiated during the life of the contract.") (citing, *inter alia*, Staff Report at V-6). The evidence as summarized in the Staff Report indeed supports the finding that contract price may be re-negotiated based on a number of different circumstances that may arise during the life of the contract. Staff Report at V-6. Plaintiffs have merely urged a different interpretation of the evidence. Similarly, Plaintiffs' argument that the domestic industry is already experiencing the price effects subject imports would likely have if the Subject Orders were lifted proposes a different interpretation of the evidence, but does not convince the court that the ITC committed any error in its finding. It is true that the evidence indicates an increase in imports of finished transformers from Canada and Mexico, which may have been made with Japanese and Italian GOES imported by transformer producers in those countries. The ITC discussed that evidence in the context of its finding that the U.S. GOES purchasers with facilities in the United States, Canada, and Mexico would likely pressure U.S. GOES producers to lower their prices in order to compete with the prices at which Japanese and Italian GOES could be purchased in Canada and Mexico. Conf. Remand Determination at 7 n.31. A review of the U.S. customers' questionnaire responses cited by the ITC reveals such evidence reasonably supports this conclusion. *See, e.g.*, [[ Importers Questionnaire Resp., Ques. II-4a & b, reprinted in Staff Report at App. D-6 ([

)). While it is possible to interpret the evidence of increased imports of transformers made with Japanese or Italian GOES as indicating that any impact the subject imports might have on the domestic industry is already being felt, the possibility of drawing two inconsistent conclusions from the record evidence does not, in itself, prevent the ITC's determinations from being supported by substantial evidence. *Consolo*, 383 U.S. at 620. As the evidence supports the conclusions and inferences drawn by the ITC from such evidence, the court finds the ITC committed no error on this issue.

On remand, the ITC shall reexamine whether the use of AUVs as an indicator of price underselling produced an accurate comparison of price differences. In reaching its determination, the ITC shall explain the differences and similarities between the products imported temporarily for re-exportation to Canada or Mexico and those imported for consumption in the United States, and support such determination with record evidence. To the extent that, on remand, the ITC revises any of the findings it made in the Remand Determination, *inter alia*, those with respect to cumulation and likely volume, the ITC shall amend its likely price effects determination accordingly.

### C. Likely Impact

The ITC is instructed by statute to consider the likely impact of imports of subject merchandise on the domestic industry if the orders were revoked. 19 U.S.C. § 1675a(a)(1). Pursuant to 19 U.S.C. § 1675a(a)(4), the ITC "shall consider all relevant economic factors which are likely to have a bearing on the state of the industry in the United States, including, but not limited to"

(A) likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,

(B) likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, and

(C) likely negative effects on the existing development and production efforts of the industry, including efforts to develop a derivative or more advanced version of the domestic like product.

The Commission shall evaluate all relevant economic factors described in this paragraph within the context of the business cycle and the conditions of competition that are distinctive to the affected industry.

*Id.* In accordance with 19 U.S.C. § 1675a(a)(1), the ITC is instructed to consider the effect of the Subject Orders, including whether improvement in the state of the domestic industry is linked to the imposition of the orders and the vulnerability of the domestic industry in the event the orders were revoked. *See* SAA at 885.

The ITC concluded that "if the countervailing and antidumping duty orders were revoked, subject imports from Italy and Japan would be likely to have a significant adverse impact on the domestic industry within a reasonably foreseeable time." Remand Determination at 16-17. The ITC concluded this after considering its original affirmative material injury determination and the effect of the Subject Orders on the state of the industry. *Id.* at 15. The ITC found that after imposition of the orders "the domestic industry's performance improved significantly." *Id.* The ITC further determined that "the domestic industry has returned to a relatively healthy state and is not currently in a vulnerable condition as contemplated by the statute's vulnerability criterion." *Id.* at 15-16. In light of its findings with respect to likely volume and price effects, however, the ITC concluded that a "significant negative impact" on the domestic industry would result and "would likely cause the domestic industry to lose market share." *Id.* at 16 (noting also that "the loss in market share and subsequent decrease in capacity utilization would be more severe in this capital intensive industry, in light of the need to maintain high capacity utilization to recoup investment."). Moreover, the ITC found:

[I]t [is] likely that the effect of revocation on domestic prices, production, and sales would be significant. The price and volume declines would likely have a significant adverse impact on the production, shipment, sales, and revenue levels of the domestic industry. This reduction in the industry's production, sales, and revenue levels would have a direct adverse impact on the industry's profitability as well as its ability to raise capital and make and maintain necessary capital investments. In addition, we find it likely that revocation of the orders will result in employment declines for domestic firms.

*Id.* at 16. Thus, the ITC made an affirmative determination of likely significant adverse impact if the Subject Orders were revoked.

Plaintiffs assert that the ITC's impact determination "rests entirely upon the 'significant' volume and price effects that it found 'likely,'" and that because those determinations cannot withstand judicial scrutiny, the impact determination must also fail. Pls.' Comments at 25. Plaintiffs further claim that the ITC's finding that the domestic industry was not vulnerable to material injury is irreconcilable with its likely adverse impact determination. *Id.* at 25-26. While Plaintiffs do not argue that a finding of non-vulnerability necessarily precludes a finding of likely material injury, Plaintiffs' view is that "[a] finding that an industry is not even 'susceptible' to material injury 'by reason of dumped or subsidized imports' seemingly makes it highly *un*-likely that subject imports would 'likely' cause material injury to that same industry within a reasonably foreseeable time, absent extraordinary circumstances." *Id.* at 26 (emphasis in original).

The ITC takes issue with Plaintiffs' argument that it cannot reconcile its finding that the domestic industry is not vulnerable under 19 U.S.C. § 1675a(a)(1)(C), with its finding that revocation of the Subject Orders would be likely to lead to material injury. The ITC claims that "[t]his argument is meritless since the statutory scheme itself reconciles the two." Def.'s Mem. at 44. According to the ITC,

a vulnerability finding relates to whether the domestic industry is in a weakened state as a result of economic factors *other than* subject imports and thus susceptible to injury as a result. The SAA further explains that if the industry is in a weakened state, [the ITC] should consider whether it will deteriorate further as a result of subject imports. Whether or not an industry is in a weakened state, the Commission must still determine whether that industry would likely be harmed by subject imports if the order is revoked. Consequently, a finding of no vulnerability does not preclude a finding of likely recurrence of material injury. . . .

*Id.* (emphasis in original) (citing SAA at 885). Thus, the ITC urges the court to sustain the likely impact determination.

The court notes the following with respect to the ITC's finding that "the domestic industry has returned to a relatively healthy state and is not currently in a vulnerable condition as contemplated by [19 U.S.C. § 1675a(1)(C)]." Remand Determination at 15-16. In accordance with 19 U.S.C. § 1675a(1)(B), (C), and relevant provisions of the SAA,<sup>36</sup> the ITC properly considered "whether there has been any improvement in the state of the domestic industry that is related to the imposition of the order[s] . . .," SAA at 884, and whether the domestic industry was currently in a vulnerable condition.<sup>37</sup> The ITC determined that these facts indicated that the domestic industry had returned to a healthy state and was not in a vulnerable condition. Remand Determination at 15. That is, it found that the domestic industry was not susceptible "to material injury by reason of dumped or subsidized imports." SAA at 885. While a finding that the domestic industry is not vulnerable may not preclude a finding that material injury is likely to continue or recur, "[a] robust industry, as indicated by such factors as increasing production, increasing capacity utilization rates, increasing shipments and strong profits is less likely to become materially injured in the near future than an industry characterized by declining production and negative profit margins." *Calabrian Corp.*, 16 CIT at 354, 794 F. Supp. at 388 ("A strong

<sup>36</sup> According to the SAA, "[t]he term 'vulnerable' relates to susceptibility to material injury by reason of dumped or subsidized imports. This concept is derived from existing standards for material injury and threat of material injury." SAA at 885 (quoting H.R. REP. NO. 317, 96th Cong., 1st Sess. 47 (1979); H.R. CONF. REP. NO. 1156, 98th Cong., 2d Sess. 174, 175 (1984)). The SAA further provides:

In material injury determinations, the Commission considers, in addition to imports, other factors that may be contributing to overall injury. While these factors, in some cases, may account for the injury to the domestic industry, they also may demonstrate that an industry is facing difficulties from a variety of sources and is vulnerable to dumped or subsidized imports. In threat determinations, the Commission must carefully assess current trends and competitive conditions in the marketplace to determine the probable future impact of imports on the domestic industry and whether the industry is vulnerable to future harm.

If the Commission finds that an industry is vulnerable to injury from subject imports, it may determine that injury is likely to continue or recur, even if other causes, as well as future imports, are likely to contribute to future injury. If the Commission finds that the industry is in a weakened state, it should consider whether the industry will deteriorate further upon revocation of an order. . . . It also should consider whether such a weakened state is due to the possible ineffectiveness of the order . . . or its circumvention.

SAA at 885.

<sup>37</sup> Specifically, the ITC found that

[f]ollowing imposition of the orders, the domestic industry's performance improved significantly. The domestic industry had a [ ] operating margin of [ ] percent in 1993. By 1997, just three years after the imposition of the orders, with a dramatic decrease in subject imports in the U.S. market, the domestic industry had a [ ] operating margin of [ ] percent. Other indicators also improved. Since 1994, the industry has both modernized existing capacity and added needed additional capacity.

Conf. Remand Determination at 16-17.

indication of the likelihood of material injury to an industry in the near future is its present state.”). Here, the ITC found that the domestic industry had added new capacity, modernized existing capacity, and increased production and capacity utilization rates. Final Determination at 20; *id.* at 17 n.81 (finding that although “the domestic industry will have sufficient capacity to supply [the anticipated] modest increase in demand [for GOES],” due to the “significant investments [by domestic producers] both to add capacity and to improve existing capacity,” “lower-priced subject imports would still have negative price effects on the domestic industry as the domestic industry would be forced to lower prices in order to compete with subject imports.”). In light of these improvements, it is difficult to see how production, sales, revenue levels, profitability, ability to raise capital, investments, and employment<sup>38</sup> would likely, i.e., probably, experience a “significant adverse impact.” This is particularly the case since the ITC has concluded that such impact was likely without identifying specific record evidence in support of its findings with respect to these factors.

On remand, the ITC shall address these deficiencies and: (1) explain how, if at all, any revisions to the ITC’s likely volume and likely price effects determinations alter its impact finding, (2) explain, in detail, the extent to which future imports factored into its no vulnerability finding, and (3) identify specific record evidence supporting its findings with respect to production, sales, revenue levels, profitability, ability to raise capital, investments, and employment.

### CONCLUSION

It is apparent that, in light of the court’s ruling with respect to the meaning of likely, the ITC’s efforts to satisfy its substantial evidence obligations by merely referencing the Final Determination have not succeeded. On remand, the ITC shall revisit the evidence cited for its findings with respect to cumulation and likelihood of continuation or recurrence of material injury and satisfy its obligations with specific reference to the evidence it claims supports its conclusions and adequate explanations of its findings based on this evidence. The ITC shall also address the record evidence which “fairly detracts” from

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<sup>38</sup>The ITC states that it made its impact determination by taking into consideration the business cycle and relevant conditions of competition, and thus complied with 19 U.S.C. § 1675a(a)(4) in this respect. See Remand Determination at 14. The ITC also claims it considered the effect revocation of the Subject Orders would have on the domestic industry in the context of the factors enumerated in 19 U.S.C. § 1675a(a)(4), i.e., production, sales, revenue levels, profitability, ability to raise capital, investments, and employment. However, the ITC does not cite any record evidence pertaining to these factors. *Id.* at 16. It appears that the ITC relied exclusively on its determinations with respect to likely volume and price effects without citing specific evidence relating to the above factors, which it found would likely suffer a “significant adverse impact.” *Id.*; Final Determination at 20.

the weight of the evidence supporting the ITC's determinations. Remand results are due within ninety days of the date of this opinion, comments are due thirty days thereafter, and replies to such comments eleven days from their filing.

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### Slip Op. 04-5

ERODIF S.A., COMPAGNIE GÉNÉRALE DES MATIÈRES NUCLÉAIRES AND  
COGEMA, INC., ET. AL., PLAINTIFFS, v. UNITED STATES, DEFENDANT.

Consol. Court Nos. 02-00219 and 02-00221

[Plaintiffs' Motion for Redress of Violation of the Court's June 25, 2002 Preliminary Injunction granted in part.]

Decided: January 20, 2004

*Weil, Gotshal & Manges, LLP (Jahna M. Hartwig, Jennifer J. Rhodes, Stuart M. Rosen)* for Plaintiffs and Defendant-Intervenors Eurodif S.A., COGEMA, and COGEMA, Inc.<sup>1</sup>

*Peter D. Keisler*, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, *Stephen C. Tosini*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, for Defendant United States.

### Opinion and Order

**Pogue, Judge:** Before the Court is Plaintiffs' Rule 63<sup>2</sup> Motion seeking redress for Defendant's violation of the Court's June 25, 2002 Preliminary Injunction enjoining liquidations of entries of low enriched uranium ("LEU"). Order at 1 (June 25, 2002).

The facts involved are undisputed. Defendant, in its Opposition to Plaintiffs' Motion, states them as follows:

On June 25, 2002, this Court issued orders granting [P]laintiffs' consent motions for preliminary injunction to enjoin liquidation of entries covered by [the] *Amended Final Determination: Low Enriched Uranium from France; and Notice of Antidumping Duty Order; Low Enriched Uranium From France*, 67 Fed. Reg.[] 6[,],880 ([Dep't Commerce] Feb. 13, 2002), and [the] *Amended Final Determination: Low Enriched Uranium from France; and Notice of Countervailing Duty Order;*

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<sup>1</sup> Plaintiffs are sometimes collectively referred to in these proceedings as "Eurodif."

<sup>2</sup> Effective January 1, 2004, Rule 63, Contempt, is now Rule 86.2.

*Low Enriched Uranium From France*, 67 Fed. Reg[.] 6[,1889 (Dep't Commerce) Feb. 13, 2002).<sup>3</sup>

We first learned of liquidations in violation of the Court's orders from counsel for [the United States Department of Homeland Security Customs and Border Protection] ["Customs"] on Friday afternoon, October 31, 2003, and notified the parties the following Monday, after confirmation of the relevant dates, entry numbers, and ports involved. Specifically Customs identified two entries of LEU that were inadvertently liquidated by the Customs Port of Baltimore. First, entry number 788-23836412 was entered on September 5, 2002, and liquidated on July 18, 2003. Second, entry number 788-23925710 was entered on October 1, 2002, and liquidated on August 22, 2003.

We also filed a status report to inform the Court of developments with regard to these liquidations on November 3, 2003. On November 7, 2003, the Court ordered us to file an updated status report by December 8, 2003.

In our status report of December 8, we informed the Court that: (1) Customs had searched all entries of LEU filed under case numbers A-27818 or C-427819 since September 30, 2000; (2) no other subject entries have been liquidated; and (3) communications with the Port of Baltimore had confirmed that the two liquidated entries were, in fact, liquidated as a result of an inadvertent clerical error. We further detailed the circumstances of the inadvertent liquidations<sup>4</sup> and informed the Court that [P]laintiffs had filed a protest with Customs concerning the entry that was liquidated on August 22, 2003.

Def.'s Opp'n to Contempt Mot. at 2-3 ("Def.'s Response").

The Court now considers Plaintiffs' motion.

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<sup>3</sup>The actual determinations subject to this motion are accurately cited as *Low Enriched Uranium from France*, 67 Fed. Reg. 6,680 (Dep't Commerce Feb. 13, 2002) (notice of amended final determination of sales at less than fair value and antidumping duty order); *Low Enriched Uranium from France*, 67 Fed. Reg. 6,689 (Dep't Commerce Feb. 13, 2002) (notice of amended final determination and notice of countervailing duty order).

<sup>4</sup>Specifically, in its Second Status Report on this matter Defendant reported as follows:

[P]ort personnel confirmed that the liquidations were the result of a database query error. The body of the instructions received by the port on June 13, 2003 indicated that the relevant period was from July 13, 2001 through January 8, 2002 and any date on or after February 13, 2002. However, the instructions' header omitted the post February 13, 2002 period. When a Customs employee performed database queries to locate entries subject to the Court's injunctions, the query was run against the dates set forth in the header of the instructions and, consequently, did not discover the entries at issue. . . . Accordingly, the subject entries were liquidated. . . .

Def.'s Second Status Report at 2-3 (Dec. 8, 2003).

### Discussion

Defendant concedes that contempt may be established upon a showing of:

(1) the existence of a valid decree of which the alleged contemnor had actual or constructive knowledge; (2) . . . that the decree was in the movant's "favor"; (3) . . . that the alleged contemnor by its conduct violated the terms of the decree, and had knowledge (at least constructive knowledge) of such violations; and (4) . . . that [the] movant suffered harm as a result.

Def.'s Response at 8 (citing *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 301 (4th Cir. 2000) (citation omitted)).

Nor is there any doubt that, in the instant case, there was a clear and valid decree, in the movant's favor, the terms of which were violated by Defendant. Moreover, despite Defendant's argument to the contrary, it is clear that "a violation of the decree need not be willful for a party to be held in civil contempt." 11A Charles Alan Wright et al., *Federal Practice and Procedure* § 2960, at 382 (2d ed. 1995) (citations omitted). It is sufficient that Defendant had knowledge of the violation, as it did here.

What is substantively in dispute between the parties here is the weight to be given to the government's claim of "inadvertence" and the adequacy of Defendant's administrative procedures for ameliorating the harm to Plaintiffs.

Specifically, Defendant proposes to remedy its own violation of the Court's injunction, and remedy the erroneous liquidations, by inviting an order directing Customs to reliquidate both of the entries in question at the final and conclusive antidumping and countervailing duty rates prevailing at the conclusion of this litigation.<sup>5</sup> See Def.'s Response at 7-8.

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<sup>5</sup>Defendant proposes to accomplish this reliquidation using the following administrative procedures:

First, Eurodif has already availed itself of an administrative remedy with respect to entry number 788-23925710, which was liquidated on August 22, 2003. Eurodif filed a timely protest pursuant to 19 U.S.C. § 1514 on November 21, 2003. Furthermore, should the protest not be heard for any reason, Customs possesses the authority to reliquidate entry number 788-23925710 at the final and conclusive rate of duty for the same reasons explained below concerning the other inadvertently liquidated entry.

Second, we propose the following administrative remedy with respect to entry number 788-23836412, which was liquidated on July 18, 2003. Customs possesses the authority to cure errors that are "brought to [its] attention . . . within one year after the date of liquidation or exaction." 19 U.S.C. § 1520(c)(1). Because this error was brought to Customs's attention "within one year" of liquidation, Customs may reliquidate entry number 788-23836412 at the final and conclusive rate of duty assessed upon this entry.

Def.'s Response at 7.

Plaintiffs argue that Defendant's proposed remedy is inadequate, noting that "[t]he Government's promise of a delayed and uncertain reliquidation provides Plaintiffs little comfort, given Customs' failure to adhere to the Court's June 25[, 2002] injunctions," Pls.' Mot. for Redress at 2, 4, and requests that the Court "order Customs to issue such further instructions as may be necessary to assure . . . that Customs shall not liquidate [prior to final court decision] entries of LEU from France" that are covered by the antidumping and countervailing duty orders. *Id.* at 4-5.

The Court gives weight to Plaintiffs' claim. The record here establishes that Defendant has not complied with the Court's June 25, 2002 injunction. Redressing that violation requires supervision of Customs' compliance with the Court's order to provide a measure of certainty that compliance will occur. Accordingly, to insure that Defendant's violation is redressed, the Court will require Defendant to monitor its compliance and report to the Court on its effort to assure compliance with the Court's original injunction.<sup>6</sup>

**THEREFORE**, upon consideration of Plaintiff's Motion for Redress of Violation of the Court's June 25, 2002 Preliminary Injunctions, Defendant's response thereto and all other pertinent papers, it is hereby

**ORDERED** that Customs shall reliquidate entry number 788-23836412 upon determination of the final and conclusive rate of duty in accordance with the Court's injunction of June 25, 2002; and it is further

**ORDERED** that Customs shall reliquidate entry number 788-23925710 upon determination of the final and conclusive rate of duty in accordance with the Court's injunction Orders of June 25, 2002; and it is further

**ORDERED** that Customs shall not distribute any funds from the cash deposits made upon entry numbers 788-23836412 and 788-23925710 pursuant to 19 U.S.C. § 1675c(a) until after Customs has reliquidated those entries in accordance with this Order; or reliquidated entry number 788-23836412 pursuant to this Order and determined a final and conclusive amount of duty to be assessed upon entry number 788-23925710 pursuant to 19 U.S.C. § 1514(c); and it is further

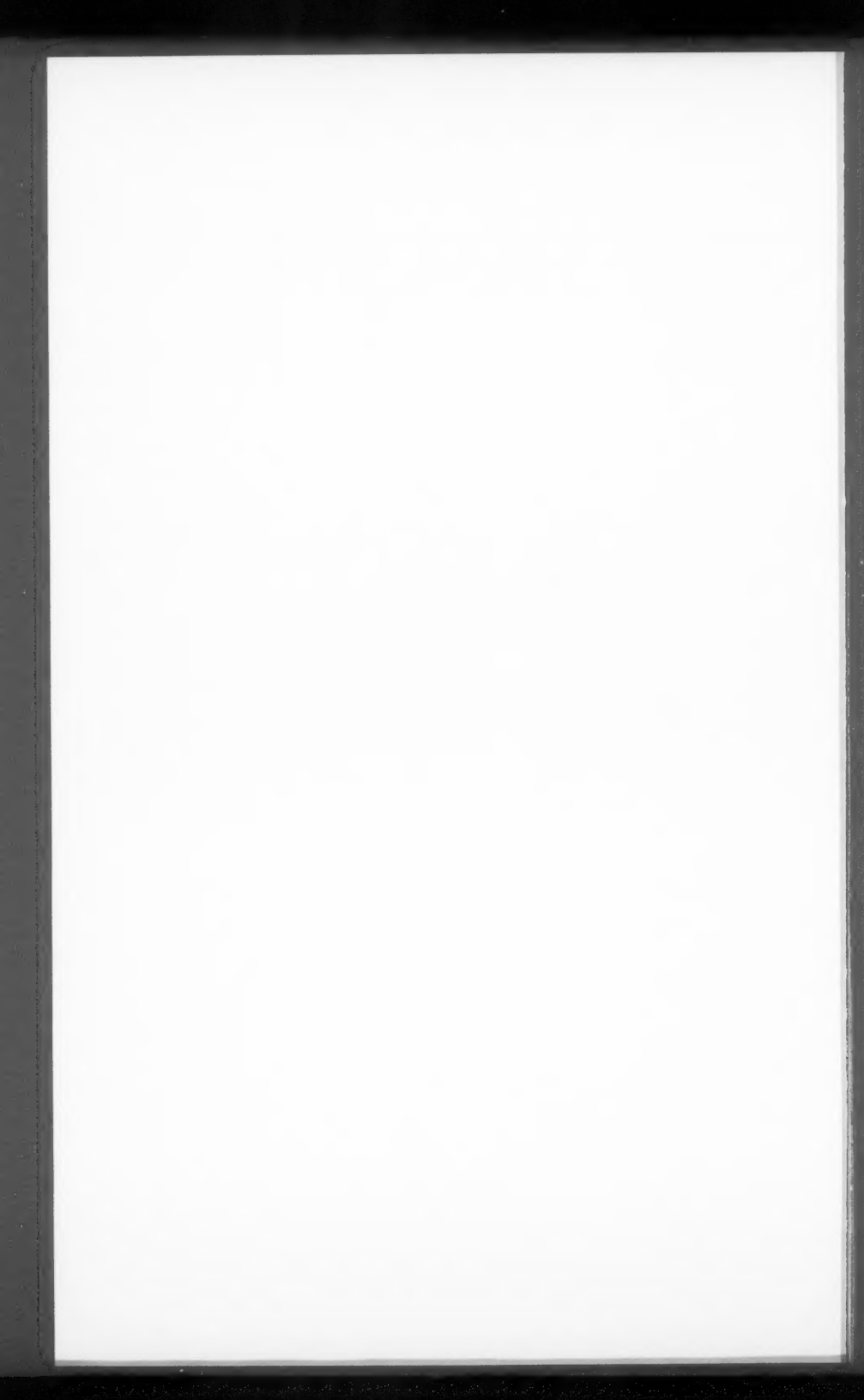
**ORDERED** that Customs shall monitor its compliance with the Court's injunction of June 25, 2002, providing such further instruc-

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<sup>6</sup> Because of the Court's disposition, it is not necessary to reach Plaintiffs' claim that the erroneous liquidations are void *ab initio*. Pls.' Mot. for Redress at 3.

tions as it determines necessary to assure compliance; and it is further

**ORDERED** that Customs shall file with the Court a regular status report indicating its compliance with the Court's injunction of June 25, 2002, and this Order, said report to be filed every 180 days.



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